No. 92-333

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1992

DETROIT AUTO DEALERS ASSOCIATION, INC. *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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ISSUES

1. Whether the nonstatutory labor antitrust exemption, applicable to multi-employer collective bargaining agreements for shorter work hours through shorter business hours under *Local 189, Amalgamated Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676 (1965), protects employer agreements providing comparable hours reductions demanded by union and non-union employees but not part of a collective bargaining agreement.

2. Whether conduct which did not adversely affect price or output, or have any adverse effect on consumers other than inconvenience, was nevertheless an unreasonable restraint of trade.

3. Whether an unprecedented order that imposes broad and intrusive affirmative obligations on automobile dealerships, including a requirement that they open for business a specified number of hours per week, is not reasonably related to the alleged violation and an abuse of discretion.

Parties to the Proceeding in the Court of Appeals[1]

Dealership Petitioners:
Barnett Pontiac-Datsun, Inc.
Jim Causley Pontiac-GMC Truck, Inc.
Jim Fresard Pontiac, Inc.
Red Holman Pontiac-Toyota-GMC Truck Co.
Art Moran Pontiac-GMC, Inc.
Packer Pontiac Co., a Division of
the Packer Corp.
Rinke Pontiac-GMC Co.
Bob Sellers Pontiac-GMC, Inc.
Shelton Pontiac-Buick, Inc.
Porterfield Wilson Pontiac-GMC Truck, Inc.
Woody Pontiac Sales, Inc.
Jack Cauley Chevrolet, Inc.
Dexter Chevrolet Co.
Dick Genthe Chevrolet, Inc.
James-Martin Chevrolet, Inc.
Jefferson Chevrolet Co.
Lou LaRiche Chevrolet-Subaru, Inc.
Walt Lazar Chevrolet, Inc.
Mark Chevrolet, Inc.
George Matick Chevrolet, Inc.
Matthews-Hargreaves Chevrolet Co.
Merollis Chevrolet Sales & Service
Ed Rinke Chevrolet-GMC Co.
Mike Savoie Chevrolet, Inc.
Les Stanford Chevrolet, Inc.
Stewart Chevrolet, Inc.
Tennyson Chevrolet, Inc.
Buff Whelan Chevrolet, Inc.

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[1]The parties marked with an asterisk do not join this petition, because they are deceased or retired.

Wink Chevrolet Co. d/b/a Bill Wink Chevrolet/GMC
Greenfield AMC/Jeep-Renault, Inc.
Village Jeep-Eagle, Inc.
Armstrong Buick-Opel, Inc.
Fischer Buick-Subaru, Inc.
Krajenke Buick Sales, Inc.
Tamaroff Buick-Honda, Inc.
Audette Cadillac, Inc.
Crissman Cadillac, Inc.
Charles Dalgleish Cadillac-Peugeot, Inc.
Dreisbach & Sons Cadillac Co.
Roger Rinke Cadillac Co.
Birmingham Chrysler-Plymouth, Inc.
Russo-Schebil Enterprises, Inc., d/b/a Lochmoor Chrysler-Plymouth Alfa Romeo Dealer
Shelby Oil Company, Inc., d/b/a Monicatti Chrysler-Plymouth Sales
Roseville Chrysler-Plymouth, Inc.
Bill Snethkamp, Inc.
Thompson Chrysler-Plymouth, Inc.
Westborn Chrysler-Plymouth, Inc.
Colonial Dodge, Inc.
Crestwood Dodge, Inc.
Garrity Motor Sales, Inc.
Mt. Clemens Dodge, Inc.
Northwestern Dodge, Inc.
Oakland Dodge, Inc.
The Meade Group, Inc. d/b/a Pointe Dodge, Inc.
Sterling Heights Dodge, Inc.
Van Dyke Dodge, Inc.
Avis Ford, Inc.
Jerry Bielfield Co.
Beverly John Ford

Jack Demmer Ford, Inc.
Gorno Brothers, Inc.
Jerome-Duncan, Inc.
Al Long Ford, Inc.
McDonald Ford Sales, Inc.
Pat Milliken Ford, Inc.
Russ Milne Ford, Inc.
North Brothers Ford, Inc.
Ed Schmid Ford, Inc.
Stark Hickey West, Inc.
Bob Thibodeau, Inc.
Ray Whitfield Ford
Arnold Lincoln-Mercury Co.
Avon Lincoln-Mercury, Inc.
Bob Borst Lincoln-Mercury, Inc.
Crest Lincoln-Mercury Sales, Inc.
Bob Dusseau, Inc.
Stu Evans Lincoln-Mercury, Inc., of Garden City
Stu Evans Lincoln-Mercury, Inc., of Southgate
Hines Park Lincoln-Mercury, Inc.
Krug Lincoln-Mercury, Inc.
McInerney, Inc.
Bob Maxey Lincoln-Mercury Sales, Inc.
Park Motor Sales Co.
Star Lincoln-Mercury, Inc.
Charnock Oldsmobile, Inc.
Drummy Oldsmobile, Inc.
Gage Oldsmobile, Inc.
Bill Rowan Oldsmobile, Inc.
Suburban Oldsmobile-Datsun, Inc.
Autobahn Motors, Inc.
McAlister Motors, Inc.
Melton Motors, Inc.
Sterling Motors, Inc.
Wood Motors, Inc.

Individual Petitioners:

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Thomas Armstrong
*Charles Audette
Frank Audette
Robert F. Barnett
Jerry M. Bielfield
Robert C. Borst
Robert M. Brent
Paul Carrick
John H. Cauley
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James E. North
James Riehl
*Roger J. Rinke
Roland Rinke
William Ritchie
Arthur J. Roshak
William H. Rowan
Myron P. Savoie
Edward F. Schmid
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Joseph B. Slatkin
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Gordon L. Stewart
Marvin Tamaroff
James P. Tellier
Harry Tennyson

Raymond R. Tessmer
Robert Thibodeau
Joseph P. Thompson
Anthony J. Viviano
Raymond J. Whitfield
Stanley A. Wilk
William J. Wink, Jr.
Donald Wood
Woodrow W. Woody
Robert Zankl

Association Petitioners:
Detroit Auto Dealers Association, Inc.
Tri County Pontiac Dealers Association, Inc.
Greater Detroit Chevrolet Dealers
Association, Inc.
Chrysler and Plymouth Dealers
Association of Greater Detroit, Inc.
Greater Detroit Dodge Dealers
Association, Inc.
Metro Detroit AMC Dealers
Association, Inc.
Metro Detroit Buick Dealers
Association, Inc.
Metro Detroit Cadillac Dealers
Association, Inc.
Metropolitan Detroit Ford Dealers, Inc.
Metropolitan Detroit Oldsmobile
Dealers Association, Inc.
Metropolitan Lincoln-Mercury
Dealers Association, Inc.
Southeastern Michigan Volkswagen
Dealers Association, Inc.
Metropolitan Detroit Chevrolet Dealers
Advertising Association, Inc.

Chrysler Plymouth Dealers of Greater
Detroit Advertising Association, Inc.
Metro Detroit AMC Advertising Association, Inc.
Ford Dealers Advertising Fund, Inc.
Lincoln-Mercury Dealers Advertising
Fund—Detroit District, Inc.
Tri County D.A.A., Inc.

Respondent:
Federal Trade Commission

Statement Pursuant to Rule 29.1:

1. Prior Model Cars, Inc., non-wholly owned subsidiary of Buff Whelan Chevrolet, Inc.

2. Stewart Management Group, Inc., parent of Stewart Chevrolet, Inc.

3. Merollis Enterprises, Inc., parent of Merollis Chevrolet Sales & Service, Inc.

4. Mealey Investment Company, parent of Birmingham Chrysler-Plymouth, Inc.

5. Kenneth Meade Trust, parent of The Meade Group, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Other Opinions

The decision of the FTC and the initial decision of the administrative law judge are published at 111 F.T.C. 417 (1989), and reprinted at 50a and 118a, respectively.

Grounds on Which the Jurisdiction of this Court Is Invoked

(i) The judgment of the United States Court of Appeals for the Sixth Circuit, 955 F.2d 457 (6th Cir. 1992), was entered on March 4, 1992, in accordance with an opinion of the court filed on January 31, 1992. It is reprinted herein at 1a.

(ii) A timely petition for rehearing and suggestion of rehearing en banc were denied by order filed on May 22, 1992.

(iii) Petitioners do not rely on Rule 12.3.

(iv) Jurisdiction is conferred by 28 U.S.C. § 1254 (1).

(v) Jurisdiction in the United States Court of Appeals for the Sixth Circuit was based upon 15 U.S.C. § 45 (c).

Statutes Involved in the Case

> Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

Federal Trade Commission Act, 15 U.S.C. § 45 (excerpt).

Statement of the Case

(i) The Facts

Petitioners are ninety-four automobile dealerships in the Detroit area, seventy-three individual principals of dealerships, eighteen dealer associations, and one association executive (hereinafter jointly referred to as "the Dealers").

During the early 1950's, automobile dealerships in the Detroit metropolitan area were open for business approximately seventy hours a week, including most evenings and Saturdays.[2] The sales employees usually worked all of these hours. 57a; Initial Decision Finding ("IDF") 92-96 at 138a. The employees strenuously objected to seventy hour work weeks. Nevertheless, they believed that they could shorten their work week without loss of income only if all Detroit area dealerships reduced uniformly their sales hours. Otherwise, the employees would lose commission income to salespersons who worked longer or different hours. 57a.

Beginning in approximately 1954, the employees demanded a reduction in their work hours through uniform reductions in the business hours of their employers. They first pressed their demand through a variety of non-union concerted activity, includ-

[2]State law required all dealerships to be closed on Sundays during the relevant time period.

ing negotiations with individual dealerships. IDF 298-99 at 177a. Many Dealers attempted individually to satisfy their employees' demand for shorter work weeks. IDF 120-21, 235-37 at 143a, 163a. They offered to close on different days, or to give employees a day off while the dealership was open, or to share commissions among teams of employees to lessen the impact of "skating" (*i.e.*, loss of commissions to a salesperson who did not make the original sales presentation to the customer), or otherwise to reduce work weeks without uniform Dealer hours. Such dealer-by-dealer concessions did not resolve the labor dispute, because while an individual dealership could shorten its own hours, this would not meet the central demand of its employees for uniform sales hours by all Dealers. Only by the Dealers' uniformly shortening the showroom hours could sales employees effectively accomplish their lawful objective under the labor laws, namely to eliminate competition in wages, hours or working conditions. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 504 n.24 (1940). As a consequence, the employees consistently refused to accept shorter hours on a non-uniform, dealer-by-dealer basis. IDF 101, 235-37, aff'd at 60a.

Following the failure of the non-union activities in the early 1950's, the employees sought to achieve uniform hours reductions through both union and non-union collective activity. There were numerous union organizing campaigns, in all of which the demand for uniform reductions in the work week was critical. These campaigns included the Teamsters in 1954 and in 1959-61; the Salesmen's Guild in 1959-61; the Automotive Salesmen Association in 1966; the Seafarers International Union in 1967; the United Auto Workers in 1970; the Teamsters in 1971; the Teamsters at various times from 1974 until the record was closed, including the month after the FTC issued its complaint seeking to force dealerships to lengthen their hours; and the Professional Automobile Salesmen of Michigan, Inc. ("PASM") in 1979 (the PASM was an association of

employees formed to preserve uniform hours, but asserted it was not a union, and did not seek collective bargaining).

Throughout the course of the labor-management dispute over hours of work, the employees initiated the demands for shorter work weeks through uniform reductions in business hours. The employees engaged in a wide range of concerted activities in their efforts to reduce uniformly the Dealers' hours of operation and to preserve those hours once achieved. These included collective bargaining in those dealerships where the employees were unionized, non-union negotiations in other dealerships, petitions, mass picketing, strikes, vandalism, violence and threats. IDF 163-282 at 150a-173a. While the perpetrators of some of the intimidation obviously remained anonymous, many actions were directly attributable to union members.[3] In other instances, the perpetrators were sales employees, who may or may not have been union members.[4] There was no evidence that any of the Dealers engaged in or condoned the coercion. See n.5 *infra*.

The Dealers, who had experienced or were aware of the turbulent history of union-management relations in Detroit, including a violent city-wide union campaign among dealership service employees in 1947, lawfully resisted the unionization

[3]"One Cadillac dealer testified that shortly before he closed on Saturdays he was approached by two union organizers who 'threatened to burn cars, break out showroom windows.' " IDF 210, cited at 60a. "During the strike at Stuart Wilson Ford [over a five day work week], the teamsters were found [by the NLRB] to have threatened nonstriking employees with physical harm, assaulted employees, placed nails on the driveway, and physically assaulted customers who attempted to cross the picket line." IDF 216 cited at 60a.

[4]One Dealer remained open on Saturdays until picketed by his non-union salesmen, salesmen from other dealerships and union members. During the picketing, "Some of his cars were vandalized. Windows at the dealership were shot out on consecutive Saturdays. His wife and daughter-in-law received threatening telephone calls at home." IDF 248, 166a. One open Dealer received an anonymous telephone call: "We know your daughter is a student at the University of Detroit and we know what route you take to work each day." IDF 276, 172a.

of their sales employees. They also lawfully opposed multi-employer bargaining, which they believed would give the union significant negotiating advantages. IDF 109-11, 157 at 141a, 149a. However, as long as the dispute over hours remained unresolved, the unions and their tactics attracted adherents. 56a-61a.

The Dealers eventually concluded that there was no solution to the lengthy labor dispute other than uniform reductions of sales hours. IDF 238 at 164a. On advice of labor counsel, the Dealers agreed to make uniform concessions to their sales employees. 58a-61a. These concessions included uniform closings on Wednesday and Saturday evenings in 1960; on Friday evenings in 1961; Tuesday evenings in 1966; Saturdays during the summer in 1969 through 1973; and Saturdays year-round in late 1973. The uniform concessions successfully resolved the labor dispute and thereafter maintained peaceful relations between the Dealers and their sales employees.

As in any labor dispute, management (*i.e.*, the Dealers) was aware of and discussed the possible business consequences of the demands of their employees. Nonetheless, the FTC found that the Dealers' agreement to shorten business hours was motivated by the pressure from the employees and their unions, not by a desire to stifle competition. IDF 241, aff'd at 61a ("The primary factor leading to the dealers' decision to close was the demands of the salesmen"). See also IDF 198, 209, 285 at 157a, 159a, 174a. The FTC recognized that "the dealers concluded that the *only* way both to avoid unionization and to achieve labor peace was to give in to the demand for ***uniform***, year-round Saturday closings." 61a (emphasis added). Similarly, although the FTC and court commented that the employees could indirectly benefit from reduced competition among the Dealers, there was neither evidence nor finding that the employees were motivated by anything other than their self-interest in reducing their hours of work without loss of income. IDF 92-104 at 138a-140a.

(ii) The Proceedings

a. The Complaint

In a complaint issued in 1984, the FTC charged that the agreement among Dealers to shorten uniformly their hours of operation violated section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, 38 Stat. 719, as amended.[5]

b. The ALJ Dismissed the Complaint

The administrative law judge dismissed the complaint because the Dealers' conduct was exempt from the FTC Act pursuant to the nonstatutory labor exemption. 201a. He also concluded that the agreement had no adverse effect on competition. 177a, 199a. He concluded that the agreement resulted from a labor dispute, that the Dealers were motivated primarily by labor concerns, and that the hours reductions had a more direct impact on labor competition than on business competition. 200a. Consequently, the nonstatutory labor exemption applied. 201a. Further, he found no substantial injury to competition or consumers, and concluded that any injury there may have been was outweighed by the benefits of labor peace resulting from the agreement. 200a.

c. The FTC Decision

The FTC reversed and upheld the charges in its complaint. 104a. It denied the exemption on the grounds that an agreement

[5]The complaint originally alleged that the Dealers were implicated in violent or unlawful acts directed at dealers who refused to close. At the close of complaint counsel's case, that allegation was dismissed without opposition for lack of evidence. 50a n.1. The complaint also named certain sales persons as respondents, but they were dismissed after the nonstatutory labor exemption was raised as a defense. There also was an allegation that the Dealers agreed with sales persons to reduce hours, but that assertion was dropped as it was inconsistent with the FTC conclusion that the agreement was not exempt because it was among Dealers rather than between Dealers and sales persons.

among employers can be exempt only if it is the result of arm's length negotiations with employees. 73a-74a. It concluded that the Dealers closed in order to avoid negotiating with a union, and consequently the exemption did not apply. 73a-74a.

The FTC concluded that hours of operation is a form of competition among dealers; otherwise the employees would not have needed to coerce the Dealers to close. 82a. It further concluded on the basis of "common sense" and economic theory that there is no economic difference between an agreement to limit hours and an agreement to increase price. 78a-79a. Although conceding that there was no evidence that prices were affected, the FTC concluded that reduced consumer convenience is the equivalent of increased prices. 85a-86a. It therefore concluded that the Dealers' actions were not exempt and violated the FTC Act.

The FTC issued an order which, *inter alia*, requires the Dealers to open for business 64 hours a week for one year and the Dealers' associations to make stenographic transcripts of all business meetings for five years. The order also prohibits all discussion of business hours.

d. The Court of Appeals

The Court of Appeals for the Sixth Circuit affirmed the FTC "generally," and remanded "for limited purposes." 33a. The court noted that the case was "close and difficult" and "presents an issue of first impression and of great difficulty." 33a, 6a. It deferred in part to the FTC. 7a, 18a. It concluded that the exemption is intended to foster the labor policy goal of collective bargaining. 13a. It affirmed the denial of the exemption because the agreement was not a direct product of collective bargaining nor of arm's length dealing with sales persons. 20a-21a.

While expressly not agreeing in all respects with the FTC's rationale, the court found "some" basis in an area that is "murky

and unclear" for the FTC's conclusion that the limitation on hours was anticompetitive. 31a.

The court remanded to determine which individual Dealers engaged in bona fide collective bargaining with a union or closed as a direct result of union directed violence. 23a-24a. It also remanded for reconsideration of several aspects of the order, not here material. 32a.

A petition for rehearing and suggestion of rehearing en banc were denied. 202a-203a.

REASONS FOR GRANTING THE PETITION

I. The Nonstatutory Labor Antitrust Exemption Protects Multi-Employer Conduct Providing Uniform Business Hours as a Bona Fide Response to Demands by Union and Non-union Employees for Shorter Hours of Work Without Reductions in Income.

1. The court of appeals' decision is contrary to *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co.*, 381 U.S. 676 (1965), which involved the resolution of a labor dispute substantively indistinguishable from the dispute and resolution in this case.

In order to shorten their 81 hour work weeks without harming their legitimate interests, the butchers and their union in *Jewel Tea* demanded that grocers in Chicago uniformly reduce their hours of operation. Shorter work weeks without reductions in sales hours would force butchers to work in the evenings, or would permit other employees to perform the butchers' work. The grocers opposed the hours reductions, but over the course of three decades were forced by collective bargaining and strikes to capitulate. 381 U.S. at 694-95.

The Dealers' sales employees also demanded shorter work weeks, and insisted that their interests would be harmed if work weeks were shortened without uniform reductions in their

employers' business hours. The Dealers resisted reducing their hours. It took nineteen years of employee and union negotiation, pressure and strikes, and Dealer concessions and compromises before the labor dispute was resolved in 1973 when the Dealers in Detroit, like the grocers in Chicago, uniformly reduced sales hours.

The basis for the FTC order and the court's affirmance is that, unlike *Jewel Tea* where the employees were all members of a union that collectively bargained the uniform hours reductions, in the present case many employees chose not to unionize, and achieved their legitimate goal through other protected labor activity.[6] But the decision in *Jewel Tea* did not depend on negotiations. The Court analyzed the subject matter of the agreement in light of national labor policy. 381 U.S. at 689. The marketing hours restriction was sought by the workers in their own interest and not at the behest of non-labor groups, and it was intimately related to wages, hours and working conditions. 381 U.S. at 689-90. It was therefore within the protection of the labor policy. 381 U.S. at 689-90. The effect of the hours reductions on competition was "apparent and real" but the effect on the butchers was "immediate and direct." 381 U.S. at 691. Because the workers' actions were "within the protection of the national labor policy" the uniform hours reductions were "therefore exempt from the Sherman Act." 381 U.S. at 690.

We ask this Court to grant a writ of certiorari because the distinction between an agreement collectively bargained by a union and a substantively identical agreement achieved through union and non-union concerted worker action in their self-interest should not determine the applicability of the exemption.

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[6]The fact that some employees may also have committed unfair labor practices by engaging in violence and vandalism does not affect the applicability of the exemption. *Apex Hosiery*, 310 U.S. at 513; *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 906 (9th Cir. 1987). Further, there would be no reason to impose an *antitrust* remedy on the *Dealers* because some *employees* violated the *labor laws*.

2. The FTC and court of appeals distinguished agreements between labor and management (*e.g.*, *Jewel Tea*) from agreements among employers, as in the present matter. They concluded that multi-employer conduct can be exempt only if it is the direct result of arm's-length negotiations with employees. This restriction conflicts with other decisions and with the policy basis for the nonstatutory exemption.

This Court has never required negotiations as a prerequisite to exempting employer conduct resulting from a labor dispute. Other courts have applied the exemption to agreements among employers where at least one of the exempt employers was not engaged in negotiations. In *Amalgamated Meat Cutters and Butchers v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979), the union sued Wetterau, which had loaned employees to a customer whose employees were on strike. Although Wetterau had engaged in no negotiations, its agreement with another employer was exempt. The court explained that labor law sanctions resistance to union demands, and an agreement among employers that has no anticompetitive effects unrelated to the resistance to labor demands is exempt. See also *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969).

In the present case, at least some of the employers negotiated with a union or non-union employees, and some entered into collective bargaining or other agreements. 13a. A labor agreement among Dealers, some of which engaged in negotiations and some of which did not, is substantively indistinguishable from *Wetterau* and *Newspaper Drivers*, in which all of the employers were exempt.

3. The court of appeals, while acknowledging that the nonstatutory exemption is intended to further the policies of the labor laws, actually frustrated those policies by depriving employees of an important benefit obtained through concerted action for their mutual aid and protection.

The exemption is intended to accommodate labor law policy when it conflicts with antitrust policy. *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) ("labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions"). Here, the court ruled that the only labor policy to be furthered by the exemption is the policy in favor of negotiations, which it (erroneously, as pointed out at 14-15, *infra*) ruled did not occur. 13a. But there are other, equally important labor policies that will be frustrated by this limited view of labor law.

The exemption has its "source" in the policy favoring "the association of employees to eliminate competition over wages and working conditions." *Connell Construction*, 421 U.S. at 622. But "association" is not limited to unionization or negotiation. It includes a broad range of concerted acts, including the acts undertaken by the workers in this case. As explained in *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (Kennedy, J.), "the nonstatutory exemption prevents the antitrust laws from being used to frustrate the primary and legitimate goal of the federal labor law, which is to permit employees to organize and act to improve wages and working conditions."

One of the labor law policies, to be sure, is the encouragement of negotiations between unions and management. But that is certainly not the only policy. Other policies include the attainment of labor peace and obtaining for employees uniform and improved working conditions, regardless of whether achieved through negotiations. Labor Management Relations Act, 29 U.S.C. § 141; National Labor Relations Act, 29 U.S.C. § 151; *Apex Hosiery*, 310 U.S. at 504 n.24.

That negotiation is not the sole policy basis of the labor laws is apparent from the labor law protection of a wide range of concerted employee actions other than unionization and negotiation. The labor laws recognize that employees may choose not

to join a union. 29 U.S.C. § 157 ("Employees ... shall also have the right to refrain from ... such activities"); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954) (the labor laws "were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood"). Employees who are not union members have the same rights as union members to achieve better or uniform wages, hours and working conditions. More to the point, employers faced with concerted employee activity have the same rights whether or not the employees are union members. *Vic Tanny International, Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir. 1980).

In the absence of a union or other representative, the employees cannot engage in traditional collective bargaining. 29 U.S.C. § 157 ("Employees shall have the right ... to bargain collectively *through representatives* . . . .") They still have the right to engage in concerted activity, which may or may not involve negotiations, to improve working conditions. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) ("labor's cause often is advanced on fronts other than collective bargaining"). In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), seven non-union employees walked off the job to protest inadequate heating, without engaging in negotiations, or even presenting a demand to their employer. Notwithstanding the absence of negotiations, their action was protected. In *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938), a group of non-employees demanded that a grocery hire blacks. There was no employment relationship, and no negotiation. The picketing was protected by the labor laws. The Supreme Court has previously ruled that the antitrust laws do not apply to concerted employee actions, although the employees are not union members and do not engage in negotiations. In *Apex Hosiery* only 8 of 2500 workers were union members; a demand had been made but there had been no negotiations.

The FTC and court had no valid basis to deny the employees

their benefit (shorter hours of work without loss of income) because they chose to exercise their rights in one manner permitted by the labor laws instead of another.

4. Although the antitrust laws were not enacted to regulate labor relations, *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Association*, 457 U.S. 702, 712 (1982); *Wetterau Foods*, 597 F.2d at 135, the decision in this case will upset for antitrust reasons an arrangement between labor and management that was motivated by a mutual desire to resolve a long-standing labor dispute.

A restraint imposed in the labor market does not violate the antitrust laws unless it affects business competition in ways that do not follow naturally from the elimination of competition over wages and working conditions. *Connell Construction*, 421 U.S. at 625. In this instance, there can be no doubt (1) that the restraint was imposed for the purpose of resolving a labor dispute and (2) that there are no effects on business competition except as flow naturally from the elimination of competition over hours. The first of these points was explicitly found by the FTC. 61a. The second is inescapable in light of *Jewel Tea*. That is, where the workers demand shorter work hours, and in furtherance of their self-interest insist that all employers uniformly reduce their business hours, the effects on business competition from uniform hours reductions flow naturally from the elimination of competition over hours.

The question boils down to whether employers can be prevented on antitrust grounds from capitulating to a legitimate labor demand for uniformity made by employees through collective action other than traditional labor-management negotiations. The concurring opinion in *Jewel Tea* (Goldberg, J.) explained that it would be "irrational" to permit labor and management to wage industrial warfare but to prohibit them from peaceably settling their disputes. 381 U.S. at 712. In *Richards v. Neilsen*, 810 F.2d at 904, the court held that "any restraint the union imposed falls within the scope of the nonstatutory labor exemption to the antitrust laws."

5. Even if the court correctly concluded that employers can be exempt only if they engage in arm's length negotiations, the court applied such a formalistic definition to negotiations as to exclude the adversarial give-and-take between labor and management found by the FTC. 56a-61a.

It is not clear whether the FTC or the court denied the exemption because the relationship between labor and management was not "arm's length," or because there were no negotiations. In either case, the conclusion is a misapplication of the law to undisputed facts. There is nothing in the record to suggest, and the FTC made no finding, that the employees and the Dealers were in anything but an arm's length relationship. The employees were seeking to further their own interests, not the interests of the Dealers. The fact that the Dealers resisted the demands and coercion of the employees for nineteen years is eloquent proof that the employees were not acting in the Dealers' interest but in their own.

The many years of give-and-take between labor and management constituted negotiations, except in the most limited and formalistic view. True, all Dealers did not as a group sit at a table across from the employees and exchange proposals and counter-proposals, though many individual Dealers negotiated directly with their non-union employees or with union representatives of their employees. 13a.

However, in labor law the concept of negotiation is broad. This Court previously ruled that collective bargaining is a "continuing process" that includes the full spectrum of actions to resolve labor disputes. *Conley v. Gibson*, 355 U.S. 41, 46 (1957). The use of economic self-help to pressure the other side is a recognized facet of bargaining. *International Association of Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 146-47 (1976). The ALJ recognized that the sequence of demands, pressure, compromise and resolution engaged in by labor and management from the early

1950's through 1973 was a process of negotiation. 198a. The FTC rejected this conclusion, but neither it nor the court explained why this did not constitute negotiation.

The court's attribution of talismanic significance to formal negotiations is based upon a misreading of *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977). The purpose for the negotiation requirement in Mackey was not to limit the exemption to certain types of negotiations, but simply to distinguish between concerted restrictions unilaterally imposed by employers, and those resulting from joint actions of labor and management. *Zimmerman v. National Football League*, 632 F.Supp. 398, 406 (D.D.C. 1986). Here, where the workers extracted the restraint from their unwilling employers, there can be no doubt of the labor bona fides of the restraint.

6. The court misconstrued decisions of this Court to conclude that it was required to defer to the FTC's analysis of the nonstatutory exemption, thereby applying an erroneous standard of review to a "close" decision that required "delicate balancing."

The court stated that *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), required it to give "some deference" to the FTC. 7a. It applied a standard of review of determining whether the FTC's interpretation of the nonstatutory exemption was "reasonable, consistent, and persuasive." 7a. However, the court should have reviewed the application of the nonstatutory exemption *de novo*. Administrative Procedure Act, 5 U.S.C. § 706 ("[T]he reviewing court shall decide all relevant questions of law, interpret ... statutory provisions ..."); *NLRB v. Enterprise Association of Pipefitters*, 429 U.S. 507, 522 n.9 (1977).

Deference is required only where an agency interprets a statute which it administers, *Lechmere, Inc. v. NLRB*, ____ U.S. ____, 117 L.Ed.2d 79, 90 (1992), or bases its conclusion on factors "within its special competence." *ASG Industries, Inc. v. United States*, 548 F.2d 147, 151 (6th Cir. 1977). In *Indiana Federation*, the Court deferred to a conclusion within the traditional expertise of the FTC that a commercial practice is unfair, though recognizing that legal issues beyond an agency's expertise are "for the courts to resolve." 476 U.S. at 454.

The application of the exemption does not require an interpretation of the FTC Act, and neither the FTC nor the court based its decision on any such interpretation. Nor does it call upon the FTC's special expertise on business competition. The FTC has decided only one prior exemption case, in which the exemption was denied because the NLRB had already ruled that the association was not a "labor organization," and there was no "labor dispute." *National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC*, 479 F.2d 139 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973).

Deference to the FTC is particularly inappropriate because the exemption requires weighing whether the FTC Act should give way to the labor laws. Not surprisingly, the FTC weighed its own jurisdiction more heavily than labor policy. That is why courts, and not agencies, must resolve conflicting Congressional policies. *Fort Knox Dependent Schools v. FLRA*, 875 F.2d 1179 (6th Cir. 1989), *vacated on other grounds*, 496 U.S. 901 (1990).

The court's improper standard of review clearly affected the outcome of the case. The court several times emphasized that the case is "close and difficult." *E.g.*, 33a. The decision required "delicate balancing." 11a. By giving improper deference to the FTC the court upset the delicate balance.

II. The Court Erred in Concluding That Conduct Which Did Not Adversely Affect Price or Output, or Have Any Adverse Effect on Consumers Other Than Inconvenience, Was Nevertheless an Unreasonable Restraint of Trade.

This Court has warned that antitrust enforcement would lack "objective benchmarks" if the Sherman Act were held to reach non-economic harm. *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53 n.21 (1977). More recently, this Court reversed a finding of injury to competition where the restraint at issue "inconvenienced some patients" but had no impact on price, quality, supply or demand. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde,* 466 U.S. 2, 31 (1984). Nevertheless, the court of appeals affirmed the FTC's conclusion that inconvenience to automobile consumers was an unreasonable restraint of trade, even while acknowledging that the FTC failed to prove actual or potential adverse impact on prices, output, or any other accepted economic injury. 24a-31a.

The court correctly held that a showroom hours agreement must be analyzed under the Rule of Reason, pursuant to which the FTC was required to prove "actual detrimental effects" or "the potential for genuine adverse effects on competition." 26a (quoting *Indiana Federation of Dentists,* 476 U.S. at 460). It recognized the need for caution before condemning association rules where the adverse effect is not "immediately obvious." 26a. The court observed that the impact of the agreement was not "immediately apparent" (26a), echoing what this Court said in *Jewel Tea* regarding restrictions on operating hours: "The decided cases thus do not appear to offer any easy answer to the question whether in a particular case an operating-hours restraint is unreasonable." *Jewel Tea*, 381 U.S. at 692-93 n.6 (*dictum*). Having set the stage, the court rejected the FTC's effort to prove adverse effects, but then inexplicably affirmed the FTC.

The court properly rejected the FTC's position that an agreement to limit shopping hours is the economic equivalent of an agreement to raise prices, pointing out that "there is no showing in this case, and the Commission can claim no reliance on a showing of higher prices or profit margins achieved by petitioners compared to other dealers similarly situated." 28a and n.13.

The court also correctly rejected the FTC's attempt to characterize the Dealers' conduct as a restraint on output. 26a-27a. Under the FTC's tortured definition, hours of operation, rather than units sold, is the appropriate measure of dealership output. 27a-28a. The FTC's assertion that consumers might have been required to "shift their shopping hours" did not alter the court's conclusion, because shifting hours is merely an inconvenience without economic significance. Further, the FTC failed to take into account the "nearby or suburban car dealers" that were not parties to the showroom hours agreement. 28a.

That the FTC found no economic injury is apparent from the conclusion of its discussion of the evidence of effect on prices. It stated,

> In any event, the parties' focus on retail prices misses the point in this case . . . . [C]onsumers pay higher prices as a result of the hours restriction in the form of reduced convenience and service. The income transferred from consumers to dealers is in the form of leisure time, not monetary profits. *These losses are not pecuniary*. . . .

85a. (emphasis added) The point is reemphasized in the discussion of the order, where the FTC states that the forced opening of dealerships will restore the benefit that was lost — "more convenient shopping and additional leisure time." 96a.

The court called the effects issue "murky and unclear," but found "some legal basis" for the FTC's conclusion. 31a. That basis was the FTC's conclusion that hours of operation "is a means of competition" among dealerships. 31a. The court accepted, with reservations, the analogy drawn by the FTC between a showroom hours agreement and the dentists' boycott that was struck down in *Indiana Federation of Dentists*. The FTC and, apparently, the court, read that decision as holding that an agreement that limits an aspect of inter-firm rivalry is, without more, unreasonable. This interpretation is far too broad. The dentists' concerted refusal to cooperate with respect to insurers' cost-containment programs was intended to reduce the role of price in health care purchase decisions. Such concerted efforts to interfere with "the price-setting mechanism of the market" have long been condemned without requiring proof of actual effects on price. *Indiana Federation of Dentists*, 476 U.S. at 461-62.

But this Court has never held that every agreement which arguably involves some aspect of competitive rivalry should be presumed unreasonable regardless of whether there is any plausible impact on price. Unlike the boycott-like behavior in *Indiana Federation of Dentists*, operating-hours restrictions have never been equated with price fixing by this Court, and here the reduced showroom hours were not shown to have affected comparison shopping, consumers' ability to negotiate prices, or the role of price in automobile purchase decisions. Thus, the FTC failed to carry its burden of proof under the Rule of Reason.

Even had the FTC satisfied the first part of the three-part analysis of effects set forth at 27a (that the restraint is inherently suspect), it plainly failed on the second part (whether there are efficiencies). The FTC rejected the Dealers' efficiency justification because the decrease in costs per car sold did not decrease costs per hour the dealership was open, the "output"

that the FTC chose to consider. 83a n.22. The court rejected that definition of output, but did not otherwise address the undisputed fact that overhead costs decreased, *i.e.*, that there were efficiencies. 29a.

III. The FTC's Unprecedented Order Is Not Reasonably Related to the Violation Found Because It Is Disproportionate to the Alleged Minimal Injury.

1. The FTC's cease and desist order, as affirmed by the court of appeals, is unprecedented: It orders the Dealers to increase their business hours to a specified level;[7] it prohibits all discussion of hours, even where agreement is neither sought nor obtained; and it requires verbatim stenographic transcripts of all association meetings for five years. 104a-111a. These intrusive order provisions are beyond the FTC's authority because they are not "reasonably" related to the practices found to violate the FTC Act. *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); *Katharine Gibbs School, Inc. v. FTC*, 612 F.2d 658 (2d Cir. 1979), *rehearing denied*, 628 F.2d 755 (2d Cir. 1979) (a trade regulation rule had no rational relation to the abuse found because it imposed a refund provision broader than the violating practices).

The violation found by the FTC is the agreement among Dealers to close certain hours of the week in response to demands made by their sales employees, an agreement that even the FTC admits would have been exempt had it been achieved through collective bargaining with unionized employees. 71a ("This would be a much simpler case if, as in *Jewel Tea*, the agreement to limit showroom hours were contained in a formal collective bargaining agreement executed

[7]The court of appeals questioned the specifics of the order (*i.e.*, the court suggested 10.5 hours a day plus some Saturday hours instead of 64 hours per week), but allowed the FTC to order the Dealers to increase their hours to a specified level.

after direct negotiations.") The FTC concedes that the hours reductions inflicted no pecuniary injury. 28a n.13. At worst, it caused consumers some inconvenience, so that forcing the Dealers to extend their hours will provide "more convenient shopping and additional leisure time." 96a. To achieve such minimal gain, the FTC seeks to impose some of the most intrusive provisions ever included in an FTC cease and desist order.

The FTC views this case as a restraint on output. 77a. It stretches the concept of output beyond economic rationality by asserting that the output restrained is not the cars purchased by customers, but the hours the showrooms are open. 77a. Based on this misdefinition of output, it ordered the Dealers to increase their "output" to a specified level. In cases involving real restrictions of output, the FTC and courts do not force a party to end a reduction in output by producing a specified number of products.

In no reported case has the FTC ordered anyone to transcribe meetings, as it does here. No exception is made for meetings on subjects other than hours, or meetings where legal counsel is a participant, or meetings attended by non-Dealers (*e.g.*, representatives of automobile manufacturers), or meetings attended by dealerships that were not parties to the complaint and not subject to the order. Given that the associations already keep minutes of their meetings, and that an agreement on hours would be public, there is no rational reason to impose a transcription burden on any Dealers, and certainly not on non-parties who attend an association meeting.

2. The order prohibits all discussion by the Dealers of hours of operation, even though some discussion is plainly not unlawful. By prohibiting lawful discussion of hours, the FTC impinges on the Dealers' rights of free speech.

Speech which is actually or inherently unlawful can be prohibited. Speech which is only potentially unlawful can be regulated, but it cannot constitutionally be prohibited. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 496 (1982); *Peel v. Attorney Disciplinary Committee*, 496 U.S. 91 (1990). The FTC's obligation to craft its restrictions on speech narrowly is well-established. *Beneficial Corp. v. FTC*, 542 F.2d 611, 619-20 (3d Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

In this instance, an *agreement* among Dealers affecting hours is (according to the FTC) unlawful, but a *discussion* of hours can be unlawful only if it furthers an unlawful agreement. Even the FTC concedes that a discussion of hours in the context of multi-employer collective bargaining is not unlawful. Nor is it unlawful for Dealers planning the annual Detroit auto show to discuss the hours the show will be open, or for Dealers to casually converse about a "midnight madness" sale. In fact, no discussion of hours would be unlawful in the absence of an agreement. By prohibiting all discussion of hours rather than just restricting such discussion, the FTC violates the Dealers' rights to free speech.

3. Even were the FTC's order within its authority, it would be an abuse of discretion because it exposes Dealers, their families and their businesses to serious risk of physical harm in order to terminate an injury which, if it exists at all, is a minor inconvenience. The FTC abused its discretion by failing to consider that the serious adverse repercussions from the order clearly outweigh the minimal benefit. *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43-44 (1983) (an agency must at least consider an important aspect of the problem and must have a plausible explanation for its decision that is not counter to the evidence). As noted in *Jacob Siegel*, the FTC must fairly con-

sider whether a "less drastic" order will satisfy "the ends of the [FTC] Act." 327 U.S. at 612-13.

Two undisputed facts demonstrate that the inconvenience imposed on consumers by not being able to shop for cars on three evenings and Saturday is minimal. First, the closings occurred at those times when there were fewest shoppers. The sales personnel, who earn a living on commissions, would not demand to close at hours when many sales could be made. Second, Detroit is ringed with communities where Saturday and evening hours are the norm. If the inability to shop on Saturday were more inconvenient than a half hour drive, consumers would simply drive to an open dealership, an alternative ignored by the FTC. 28a. The FTC offered no testimony of a consumer claiming to have been inconvenienced.

The remedy to this inconsequential inconvenience will cause disproportionate harm to consumers and Dealers. The FTC conceded that its order would impose monetary costs on Dealers, thereby increasing the cost of cars to consumers. It discounted this cost on the assumption that the increased cost would be spread among more hours. 83a n.22, 96a. But spreading the increased cost among more hours will not lower the price of cars. More significantly, the FTC ignored the most serious repercussion of its order. For a quarter of a century, Dealers who extended their hours were subjected to such coercion as destruction of property, assaults on employees and customers, bombs, death threats to themselves and their families.[8] The coercion was intended to, and did, force the

[8]The testimony was chilling: "My brother walked across the showroom and someone shot a rifle through the window." "[T]here was quite a few nights I slept with a shotgun next to my bed. We were frightened." "[A] stick of dynamite was hooked up to a light switch somehow in the clean-up shop. . . . " "There were collections taken [by sales personnel] to bring in outside goons to do damage. . . ." "I was begging for a police

Dealers to reduce their hours, as the FTC acknowledged. 56a-61a. By ordering the Dealers to lengthen their hours, the FTC exposes them to renewed labor unrest and retaliation by their employees and unions.

The FTC abused its discretion because it failed to weigh the minimal benefits from longer hours against the serious risk of harm that longer hours will entail. Its justification for exposing the Dealers to violence (*i.e.*, the *FTC* will not be "cowed" by threats that the *Dealers* will be injured) is false bravado because the FTC faces no threat. 98a. In an analogous case, an order was vacated as an abuse of discretion because the case was "a close question" and the order "would be of minor significance to the realization of the goals of the Act ... and would place an unfair burden on Wards." *Montgomery Ward & Co. v. FTC*, 691 F.2d 1322, 1334 (9th Cir. 1982).

4. The mandatory opening provision violates the Norris-LaGuardia Act ("N/LG Act"), which prohibits a court in a case involving a labor dispute from issuing an injunction prohibiting any person from ceasing to perform work. 29 U.S.C. § 104. It does not matter whether the conduct is exempt; if the refusal to work arises in a case involving a labor dispute a court cannot order the return to work. *Milk Wagon Drivers' Union v. Lake Valley Farm Products*, 311 U.S. 91, 100-103 (1940). It is indisputable that the present case involves a labor dispute. Nor can it seriously be doubted that the FTC's order

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officer." "I bought three or four good sized fire extinguishers, had them installed in my home." "You don't know — if you've never experienced the Teamsters, playing with the Teamsters. Ask Jimmy Hoffa. I mean, they play tough up here and they play hardball."

prohibits persons involved in the dispute from not performing work.[9]

[9]The order does not directly require employees to work on Saturdays or in the evenings. The FTC asserts that employees can avoid longer work hours by agreeing to split shifts or by increasing the size of the work force. 97a. The suggestion is contrary to the FTC's own findings. It was to avoid splitting shifts or sharing commissions among a larger number of employees that led the employees to demand uniform hours. Lengthening the sales week will inevitably force employees to lengthen their work week.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit.

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Supreme Court of the United States

October Term 1992

DETROIT AUTO DEALERS ASSOCIATION, INC. *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX I

Nos. 89-3388/3389/3390/3391/3392

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re DETROIT AUTO DEALERS ASSOCIATION, INC., et al.,

BARNETT PONTIAC-DATSUN, INC., et al.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Decided and Filed January 31, 1992

Before: RYAN, Circuit Judge, LIVELY and WELLFORD*, Senior Circuit Judges.

WELLFORD, Senior Court Judge, delivered the opinion of the court, in which LIVELY, Senior Circuit Judge, joined. RYAN, Circuit Judge (pp. 32-45), delivered a separate opinion concurring in part and dissenting in part.

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*The Honorable Harry W. Wellford assumed senior status on January 21, 1991.

WELLFORD, Senior Circuit Judge. The respondent, Federal Trade Commission (FTC), issued a final order bearing upon trade practices of Detroit area automobile dealers after a lengthy investigation on February 22, 1989. By this challenged order, FTC held invalid and illegal an agreement or agreements to limit hours of operations among the competing automobile dealers involved in this controversy, and their trade associations. Most of the more than ninety dealers, some eighteen trade associations, and seventy-eight individual principal owners or operators of the automobile dealerships have petitioned to set aside the FTC order.

In 1984, the FTC issued an administrative complaint against petitioners and others charging them with arbitrary and anticompetitive action in keeping their automobile showrooms closed all day Saturdays and on three weekday evenings through alleged coercive and unlawful means (an asserted violation of 15 U.S.C. § 45). After hearings on this complaint, the administrative law judge (ALJ) issued an initial decision on July 14, 1987, in which he found that petitioners' agreement to limit showroom hours was engendered by labor disputes with automobile salesmen, and concluded that there was no violation as charged. FTC counsel appealed to the entire Commission, which unanimously reversed the ALJ decision, holding that, at least in part, the agreement constituted an effort by competitors to avoid collective bargaining with salesmen and, ultimately, unionization.

The Commission held that the agreement to limit showroom hours was not the product of arms' length negotiations, was designed to frustrate labor negotiations with the salesmen, and that antitrust laws should be held to apply to this type conduct. In sum, the Commission held that the claimed nonstatutory exemption did not apply and that the agreement brought about a restraint on "an important form of output and

a dimension in which new car dealers compete" without an adequate efficiency showing, or other justification.

Petitioners defended unsuccessfully against the administrative charges by contending that there was no adverse effect on new car prices in the Detroit area, and that, under all the circumstances, the agreement was reasonable and legitimate. The order, which is now the subject of appeal, barred dealers from continuing to operate under the agreement's limited showroom hours, and it prohibited petitioners from inducing others to abide by the agreement in this respect. The order required dealers to stay open at least 64 hours per week for one year and to advertise these extended open hours of operation. Petitioner associations are required to keep transcripts of all business meetings for five years and (1) to amend any bylaws inconsistent with the order; (2) to prohibit discussions of hours of operation; and (3) to expel members who violate the proscription about hours of operation. Finally, the FTC order mandated certain reporting in order to monitor compliance, and the furnishing of copies of the order to employees. Petitions for review of individual dealers and associations concerned were timely filed and have been consolidated. They meet the requirements of *Minority Employees v. Tennessee*, 901 F.2d 1327 (6th Cir.), *cert. denied sub nom., Davis v. Tennessee Dept. of Employment Sec.*, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990), in all respects.[1]

It is undisputed that the business of each petitioner is in retail sales of new automobiles in the Detroit metropolitan area, and that the agreement in dispute among petitioners is not directly mandated by any multi-employer collective bargaining agreement. In 1959, when a labor organization began efforts to unionize salesmen, most of the petitioners and other dealerships selling new cars in Detroit were open every weekday

[1]William Hickey, one of petitioners in No. 89-3391, is now deceased and he has been dismissed from the proceeding.

night and on Saturdays as well. Two competing unions were involved in unionization attempts by 1960. Each demanded multiemployer bargaining, uniform work weeks, shorter hours, higher commissions, and other benefits. As a consequence, by agreement among themselves, petitioners, and others, began to reduce hours that showrooms were open.[2] The FTC complained that the series of agreements resulting in shorter hours were not with unions nor with salesmen, but were arranged among petitioners to forestall growing and bitter disputes concerning hours of operation. Petitioners emphasize that the agreements were the result of demands by salespersons, or their purported representatives, to reduce the long working hours without reducing their income.

There is little dispute about the fact that at dealer association meetings union demands were discussed and the associations and members determined to resist unionization vigorously. The unions lost most of their 1959 efforts to unionize after two night closings were effectuated. By 1973, petitioners concede that they were closed at night except Mondays and Thursdays, and also closed all day Saturdays. The ALJ was persuaded by petitioners that the reduction of hours was "the *result* of a labor dispute—the give and take of a struggle between labor and management." (Emphasis added). The ALJ also held that "[s]ome closings were in fact collectively bargained," and that "[s]ales employees negotiated a prohibition on reopening." He also decided that "sales employees and their unions reinforced their demands for uniform shorter hours by intimidation and violence on many occasions and over many years," and that "[s]ome dealers agreed orally and informally with sales employees and their unions to meet the demands for uniform shorter hours." All this, he concluded, was "part of the collective bargaining process." At the same time, it

[2]Detroit Automobile Dealers Association (DADA) recommended during 1959 that dealers close two nights a week.

seems clear that DADA was engaged in concerted and consistent efforts to "persuade" those uncooperative dealers who were not complying with the shorter hours arrangement to do so. Not only did the ALJ find the labor exemption to apply, he also concluded that the constricted hours of operation did not bring about any substantial injury to competition nor to consumers in the form of higher prices for new cars.

During the 1970s, the Teamsters Union made further organizational efforts, including picketing and institution of strikes, on behalf of dealer sales personnel using Saturday closings as a basis for recruitment. The union was unable to attain this general goal, however, through collective bargaining with dealers, their association, or their representatives, but the Teamsters Union did attain agreements not to extend existing hours of operations. Both the dealers and their sales personnel were concerned about competitors staying open longer hours and thereby drawing business away from "cooperating" dealers. There was some evidence that dealers thought the Saturday closings brought about less customer shopping for lower prices and thus increased dealer profit margins. There was evidence of violence and intimidation by salespersons and others, including union sympathizers, to bring about shorter hours. Petitioners uniformly and consistently resisted multi-employer bargaining to thwart the union's efforts in this regard. The Commission concedes that a "decision not to form a multi-employer bargaining unit is not fatal to respondents' nonstatutory labor exemption defenses."

FTC points out that Detroit is the only area in the country which has new car dealers closed on Saturdays. Petitioners claim the closings came about to accomplish labor peace and in response to union and salespersons' constant pressure. Dealers who did open, or attempt to open, on Saturdays have been subject to picketing, threats, violence, and damage to

their property, and some of this picketing has been on the part of sales personnel.

This case presents an issue of first impression and of great difficulty and has been vigorously pressed by both parties. Petitioners' position is set forth succinctly in their brief at 9:

> The Federal Trade Commission erred as a matter of law and of fact in ruling that the uniform reduction of business hours by automobile dealers was not exempt from the antitrust laws pursuant to the nonstatutory labor exemption. The FTC also erred in finding and concluding that the uniform reduction of hours constitutes a restraint of trade in violation of Section 5 of the FTC Act. 15 U.S.C. § 45.[3]

The FTC summarizes its position in response as follows:

> The Commission correctly held that the nonstatutory labor exemption is a narrow adjunct to the statutory exemption, and that its application requires a balancing between the congressional policies favoring competition and those favoring bona fide labor negotiations [and] . . . should be subject to close scrutiny.
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> Substantial evidence supports the Commission's finding in this case that the dealers agreed among themselves and not with their employees. Indeed, the dealers admit that they entered into their agreement to avoid labor negotiations and to frustrate the unionization effort. The Commission properly found

[3]As a back up position, petitioners assert that the FTC order, in any event, "violates the Norris-laGuardia Act whether or not the exemption applies [by forcing] dealers to violate the labor laws by preventing bargaining on mandatory subjects of bargaining."

that the dealers' agreement restricting showroom hours did not result from bona fide arms' length labor negotiations.

In reviewing the FTC decision, we gave plenary review to its analysis of legal issues, but it is entitled, nevertheless, to some deference. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986). We must determine whether the interpretation of the statute in this case made by FTC, a government agency, is "reasonable, consistent, and persuasive." *Whiteside v. Secretary of Health & Human Servs.*, 834 F.2d 1289, 1292 (6th Cir.1987).

On the other hand, the FTC's findings of fact, "if supported by evidence," are determinative. 15 U.S.C. § 45(c); *Indiana Federation of Dentists*, 476 U.S. at 454, 106 S.Ct. at 2015. We review these findings on the standard of whether there is substantial evidence in the record to support the finding made, not on a preponderance of evidence standard. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951). We will "accept the Commission's *findings of fact* if they are supported by 'such relevant evidence' as a *reasonable* mind might accept as adequate to support a conclusion." *Indiana Federation of Dentists*, 476 U.S. at 454, 106 S.Ct. at 2015 (quoting *Universal Camera*, 340 U.S. at 477, 71 S.Ct. at 458) (emphasis added).

I. NONSTATUTORY LABOR EXEMPTION

The parties seem to agree that the purpose of the nonstatutory labor exemption is to advance policies and objectives of the labor laws including "association of employees to eliminate competition over wages and working conditions." *Connell Construction Co. v. Plumbers & Steamfitters, Local Union No. 100*, 421 U.S. 616, 622, 95 S.Ct. 1830, 1834, 44 L.Ed.2d 418 (1975). Petitioners argue that what was done to

limit showroom hours was, in effect, done by salesperson employees who may act in concert to achieve better working conditions whether through a union, or otherwise, citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962). That case, however, concerns the undoubted right of employees to act in concert against their own employer over a legitimate issue of working conditions under § 7 of the National Labor Relations Act. The question in *Washington Aluminum Co.* concerned only a few employees of the respondent company who had been terminated due to engaging in a work stoppage over claimed unreasonable and intolerable working conditions.

We find a paucity of cases dealing with this labor exemption issue. *National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC*, 479 F.2d 139 (5th Cir.), *cert. denied*, 414 U.S. 1004, 94 S.Ct. 360, 38 L.Ed.2d 240 (1973), dealt with an appeal from a FTC cease and desist order precluding NAWCAS, an association of ready-to-wear clothing salespersons, from refusing to deal with certain manufacturers from regional trade shows sponsored and carried on by NAWCAS. Among other things, in discussing the nonstatutory labor exemption, the court observed that "the antitrust laws yield only insofar as the union pursues legitimate subjects of collective bargaining." *Id.* at 144. The association in *National Ass'n* was deemed disqualified from functioning as a labor organization under the circumstances of that case, which did not involve directly an employer's refusal to bargain with or to recognize a legitimate labor organization.[4]

Another court considered the nature and background of the nonstatutory labor exemption to the antitrust laws in *Amal-*

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[4]The court discussed the standard of review in a footnote: whether or not "the evidence in the record reasonably supports the administrative conclusion." *Id.* at 145 n. 10.

gamated Meat Cutters & Butchers Workmen, Local Union No. 576 v. Wetterau Foods, 597 F.2d 133 (8th Cir.1979):

> [I]t is necessary to examine congressional intent in the context of accommodating the Sherman Act to the policies of federal labor laws. The antitrust laws were enacted to prevent restraints to free competition in business and commercial transactions that tend to restrict production, control prices or otherwise control the market to the detriment of consumers. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940). They were not enacted to regulate labor relations.
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> Congress provided a statutory labor exemption from the antitrust laws. 15 U.S.C. §§ 17 and 26; 29 U.S.C. §§ 52, 104, 105 and 113; *see Connell Construction Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621, 622, 95 S.Ct. 1830 [1834], 44 L.Ed.2d 418 (1975). Although these statutes do not directly address the activities involved in this case where the agreement is between two employers, these statutes demonstrate a congressional purpose to restrict the application of the antitrust laws when they unduly interfere with the goals of federal labor law. In resolving conflicts in areas where federal antitrust and labor policies seemingly overlap, the Supreme Court has recognized a nonstatutory labor exemption.
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> Defining the boundaries of this exemption has not proved an easy task. A court must balance the degree of interference with federal labor policy with the magnitude of the restraint of trade and whether the restraint directly or indirectly affects market prices and free competition for the consuming public.

Id. at 135, 136 (footnotes omitted).

Wetterau found that the agreement between two employers to furnish workers to a party strike bound employer did not violate antitrust laws and "had no purpose or effect beyond the scope of the labor dispute, [and] . . . had no anticompetitive effect unrelated to the collective bargaining negotiations." *Id.* at 135, 136. The nonstatutory labor exemption was therefore found to apply. *See by analogy Newspaper Drivers & Handlers Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir.1968), *cert. denied*, 395 U.S. 923, 89 S.Ct. 1775, 23 L.Ed.2d 240 (1969); *see also Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977) ("under appropriate circumstances, we find that a non-labor group may avail itself of the [nonstatutory] labor exemption.").[5] *Mackey* discussed the nonstatutory labor exemption at some length and held that it turned "upon whether the relevant federal labor policy is deserving of pre-eminence over federal antitrust policy under the circumstances of the particular case." *Id.* at 613.

The FTC cites *Mackey* in support of its position as follows:

> [T]he policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

543 F.2d at 614.

Courts have declined, in any event, to adopt a *per se* analysis of the nonstatutory labor exemption issue "in favor of an inquiry into the reasonableness of the restraint under the circumstances." *Mackey*, 543 F.2d at 619, *citing White Motor*

[5] *Mackey* held also that "the basis of the nonstatutory exemption is the national policy favoring collective bargaining." 543 F.2d at 612.

Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963); *Worthen Bank & Trust Co. v. National Bank Americard, Inc.*, 485 F.2d 119 (8th Cir.1973), *cert. denied*, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974).

We adopted the standards set out in *Mackey* in analyzing another professional sport controversy between a hockey player and the National Hockey League. Those standards deemed to be proper in *Mackey* were reiterated in *McCourt v. California Sports, Inc.*, 600 F.2d 1193 (6th Cir.1979):

> First, the labor policy favoring collective bargaining may potentially be given pre-eminence over the antitrust laws where the restraint on trade primarily affects only the parties to the collective bargaining relationship. Second, federal labor policy is implicated sufficiently to prevail only where the agreement sought to be exempted concerns a mandatory subject of collective bargaining. Finally, the policy favoring collective bargaining is furthered to the degree necessary to override the antitrust laws only where the agreement sought to be exempted is the product of bona fide arm's-length bargaining.

Id. at 1197-98 (citations omitted).

In *McCourt*, unlike *Mackey* in the dispute with the NFL, we found that the parties had been engaged in "good faith, arm's-length bargaining" recognizing that "nothing in the labor law compels either party ... to yield on its initial bargaining position." *Id.* at 1200. Thus, we held that the nonstatutory labor exemption applied to the owners' actions.

The delicate balancing involved in the labor exemption may be observed in the following expressions from *Connell Construction Co. v. Plumbers*, 421 U.S. at 622-23, 95 S.Ct. at 1834-35:

> Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members. Thus, while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, *e.g.*, *Federation of Musicians v. Carroll*, 391 U.S. 99 [88 S.Ct. 1562, 20 L.Ed.2d 460] (1968), the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market.

(Citations omitted).

The FTC argues that because the agreement at issue was among dealers, not involving unions or employees, there was a direct antitrust violation through restraint of trade by means of closing of showrooms and foreclosing availability of new cars to the public. FTC adds that the purpose of the dealers' agreement was "to avoid collective bargaining and to obtain the benefits of reduced competition . . . [and to avoid] arm's-length good faith bargaining." Petitioners respond that they were forced, through union and collective salesperson pressure, to reach agreement on standardized and uniform—and limited—showroom hours. We must decide whether the agreement should be subject to the nonstatutory labor exemption and therefore be immunized from antitrust scrutiny.

Although the great bulk of salespersons involved with petitioners are nonunion employees, we have stated that the labor laws recognize no distinction between "union and unorganized employees who . . . join[ ] in concerted actions to deal with their grievances." *Vic Tanny Int'l, Inc. v. NLRB*, 622 F.2d 237, 241 (6th Cir.1980). *See NLRB v. Loyd A. Fry Roofing Co.*, 651 F.2d 442, 445 (6th Cir.1981).

The statutory labor exemption from antitrust laws specifically provides for labor unions and labor organizations. Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52; Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105, 113; *Connell*, 421 U.S. at 621, 622, 95 S.Ct. at 1834, 1835. This exemption may only be asserted by a labor organization itself, not by employers. *James R. Snyder Co. v. Associated Gen. Contractors*, 677 F.2d 1111, 1118 n. 10 (6th Cir.), *cert. denied*, 459 U.S. 1015, 103 S.Ct. 374, 74 L.Ed.2d 508 (1982); *United States v. Hutcheson*, 312 U.S. 219, 232, 61 S.Ct. 463, 466, 85 L.Ed. 788 (1941).

The nonstatutory labor exemption is not so narrowly limited; it extends antitrust immunity to both labor unions, employees, and to non-labor parties; those who have engaged in *bona fide* labor negotiations. *Connell* recognized a "limited nonstatutory exemption from antitrust sanctions" to a union-employer agreement which limited competition based upon favored collective bargaining principles. 421 U.S. at 622, 95 S.Ct. at 1834; *but cf. Carpenter's Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir.1982) (nonstatutory exemption only incidentally applicable to employers; not applicable when employers combined to hire only non-union contractors and subcontractors), *cert. denied*, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983).

The FTC concedes that there were some dealers among petitioners that negotiated agreements with labor unions. The FTC decision, however, held that these negotiated agreements

"simply perpetuated the results of earlier collusions" between petitioners. Further, the FTC argues that even if some negotiations took place, these few "cannot shield an otherwise anticompetitive agreement." *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945). On the other hand, petitioners maintain that because a few petitioners negotiated agreements with a union concerning hours of work, all are protected by the nonstatutory labor exemption.

Hours of work have been held to be "subjects . . . about which employers and unions must bargain." *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea*, 381 U.S. 676, 691, 85 S.Ct. 1596, 1602, 14 L.Ed.2d 640 (1965). Similarly, hours during which automobile showrooms will be open by employer dealers are subjects of bargaining between dealers and their employees, whether or not represented by a union. In *Jewel Tea*, the Court held that an agreement, reached through "bona fide, arm's-length bargaining" limiting the number of hours retail meat departments would be open to the public (closing at 6 p.m.) was "beyond the reach of the Sherman Act." *Id.* at 690-91. The decision was based on the rationale that working hours were "a subject of immediate and legitimate concern to union members," *Id.* at 692, without any extended analysis as to whether and to what extent this limitation affected the public adversely in the antitrust context. In *Jewel Tea*, the limitation upon hours of operation in retail grocery meat departments was imposed by a powerful combination of meat cutters, the defendant union, upon a recalcitrant employer operator, Jewel Tea, after reaching an agreement with other grocery operators in the Chicago area. Here, by contrast, the FTC claims to represent the public interest by protecting the public's ability to buy during longer hours as opposed to the workers' group claim to represent the public interest through limitation of hours as in *Jewel Tea*.

The question remains: was this done by Detroit car dealers after or through a process of bona fide, arm's-length dealing with car salespersons and their representatives, as was found to be the situation in *Jewel Tea*? Or is the situation in our case like that described in *Jewel Tea* as "not exempt from the Sherman Act . . . an effort by the unions [or associations of dealers] to protect one group of employers from competition by another?" *Id.* at 693; *see also International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384, 393 (3d Cir.1973), *amended*, 494 F.2d 1353 (1974). If the latter, then the case by the FTC depended "on whether the elements of a conspiracy in restraint of trade or an attempt to monopolize had been proved [and] whether the restraint was unreasonable." *Id.* 381 U.S. at 693 & n. 6[6], *California State Council of Carpenters v. Associated Gen. Contractors, Inc.*, 648 F.2d 527, 544 (9th Cir.1980) (denial of rehearing en banc), *rev'd on other grounds*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

The FTC found that the agreement in controversy in this case was "an unlawful restraint of trade," or "an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act," as charged in the FTC complaint. The FTC final opinion recited the undisputed history of restricting new car sales operations by dealers and the efforts of DADA "to bring remaining members [still operating on Friday nights in 1964] into compliance" with a Friday night closing policy, and later similar efforts concerning Tuesday night closings. The opinion also recognized that salespersons wanted shorter showroom hours, and particularly, "*uniform* showroom hours," and that, beginning in the 1950s unions seeking

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[6][T]he decided cases do not appear to offer any easy answer to the question whether in a particular case an operating-hours restraint is unreasonable." *Id.* at 693 n.6.

to organize salespersons were demanding uniform shorter showroom hours through attempted multi-employer bargaining. Petitioners were advised by their counsel to resist multi-employer bargaining in order to avoid unionization of salespersons. The FTC agreed with the ALJ's finding that counsel also advised petitioners in order to effect this goal "to make uniform concessions to sales employees."

The FTC also recognized that there were a number of strikes at individual dealers in connection with similar union organizing attempts by a new union in 1967 and 1968, some of which were "lengthy . . . involved violence, threats of violence, and vandalism." "The question of shorter hours focused on Saturdays."[7] By 1970, salespersons rallied and petitioned DADA to close on Saturdays. There were additional strikes during the early 1970s; "threats, physical assaults, and property damage were common," and dealers "were apparently unable to resolve the salesmen's complaints." The FTC further opined that "ultimately, the dealers concluded the only way to avoid unionization and to achieve labor peace was to give in to the demand for uniform, year-round Saturday closings."

The ALJ and the Commission reached different conclusions essentially on these same factfindings concerning applicability of the nonstatutory labor exemption. The Commission focused on direct "collective bargaining" as the key element of the nonstatutory labor exemption, citing *Mackey*, and *Zimmerman v. National Football League*, 632 F.Supp. 398 (D.D.C.1986). At the same time it conceded that the exemption is not limited "only to collective bargaining agreements [nor to] formal labor contract[s]." In *Richards v. Neilsen*

[7]The new union, ASA, won elections at 100 dealerships, and negotiated collective bargaining agreements with 29 of these, but ASA was not successful at ending Saturday work.

Freight Lines, 810 F.2d 898 (9th Cir.1987), an independent trucker sued four major truckers and the union that represented employees of the defendants claiming an antitrust violation in the form of a conspiracy among defendants to boycott plaintiff and force it to recognize the defendant union. *Richards* held that "any restraint the Union imposed falls within the scope of the nonstatutory labor exemption to the antitrust laws." *Id.* at 904. That court went further to hold:

> Even if such conduct were a violation of the labor law, it would bear such a close and substantial economic relation to a union's legitimate attempt to organize a specific employer that it falls well within the purpose and the coverage of the exemption from antitrust liability.

Id. at 904.

In *Richards*, Judge (now Justice) Kennedy found the purpose of such exemption was "to permit employees to organize and act to improve wages and working conditions." *Id.* at 905; *cf. California State*, 648 F.2d at 544. The court in that case required plaintiff to demonstrate that defendant's actions, even if in concert and triggered by defendant union, "created substantial anticompetitive effects tangential or unrelated to the legitimate central purpose of organizing a company." *Id.* at 905. While we believe *Richards* goes to the extreme in protecting union activity to organize an employer and force it to submit to a "standard" or uniform union contract utilized with union carriers as being covered by the nonstatutory labor exemption, that case does recognize that the exemption may apply to situations where a collective bargaining restraint had not already been applied to the plaintiff, and the Commission recognized *Richards* as authority to this effect. On the other hand, in *Zimmerman*, 632 F.Supp. 398, the court held that a "direct restraint on the business market is not shielded by

the labor exemption." *Id.* at 405 ("agreements that primarily affect competitors of the employer or ... economic actors completely removed from the bargaining relationship" are not protected.).

By contrast, the Commission viewed the agreement in controversy here as "inherently suspect" in limiting hours of operation. The agreement was suspect because it "cut down" shopping, according to the Commission, thus preventing the "forcing down" of prices. "Showroom hours," in other words, were found to be "a basis on which dealers compete for customers." Next the Commission found that petitioners had shown "no valid procompetitive justifications."[8] This difference of opinion between the ALJ and the Commission on the same facts illustrates both the complexity and difficulty of this case which differs materially from the relatively few cases which have analyzed and considered this exemption in other factual contexts.

While we review the legal conclusions essentially de novo, we owe some measure of deference to the Commission's conclusions and its "informed judgment" in this area dealing with alleged unfair and anticompetitive commercial conduct of a large group of competitors who have formed together without dispute to agree upon hours of operation and to bring pressure upon the similarly situated dealers to comply. *Indiana Federation of Dentists*, 447 U.S. at 454, 106 S.Ct. at 2015. Petitioners strenuously argue that the alleged anticompetitive conduct was motivated by a desire for labor peace and that the agreement primarily benefitted salespersons who pressured them over a long period of time for shorter, and uniform, hours of opera-

[8]Lower dealer overhead and attracting higher calibre salespersons were discussed briefly and dismissed as insufficient in this regard. These reasons given by petitioners may not be "justifications," but they may represent valid bases for actions that have relationship with competitive purposes.

tion. The FTC argues that there was no negotiation with labor unions, or even arm's length bargaining with representatives of salespersons, that brought about the agreement.

Our examination of the opinion of the Commission satisfies us that it considered carefully the background and factual circumstances involved in the ultimate agreement among petitioners to stay open only Monday and Thursday nights and to remain closed on Saturdays. We are also satisfied that the Commission analyzed and set out in its opinion the legal precedent and rationale for its decision. We find no error in the following specific legal conclusions of the Commission:

> 1. To say that collective bargaining is at the heart of the [nonstatutory labor] exemption, however, is not to say that the exemption applies only to collective bargaining agreements.
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> 2. [T]he cases also demonstrate that concerted conduct does not automatically qualify for the exemption simply because it is motivated by labor concerns . . . motivation by labor concerns is only a necessary and not a sufficient condition for application of the nonstatutory exemption.
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> 3. The vast majority of nonstatutory labor exemption cases involve some sort of concerted activity or agreement between a union and an employer.
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> 4. [T]hose few cases [involving only employers] clearly show that the nonstatutory labor exemption protects employer agreements only when those agreements are part of the give-and-take of a negotiation process.
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> 5. [T]he agreement . . . was designed to prevent collective bargaining . . . to *avoid* arm's length negotiation.

> 6. The mere fact that sales employees benefit from the hours restraint also cannot justify granting an exemption . . . since they have the same incentive to reduce competition as the dealers.
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> 7. *Jewel Tea* [381 U.S. at 676, 85 S.Ct. at 1596] and the present case have superficial similarities. Both involve a restriction on marketing hours and efforts by labor unions to obtain shorter working hours. But in *Jewel Tea*, unlike the case before us, the agreement was one to which the employees and employers were parties. Moreover, there was no question in *Jewel Tea* that the restrictive agreement had been reached through bona fide, arm's length bargaining.
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> 8. Respondents [petitioners here as a group] have agreed among themselves, not with their employees.
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> 9. [T]he decision not to form a multi-employer bargaining unit is not fatal to [the] nonstatutory labor exemption defense.

Petitioners rely on *Jewel Tea*, but we find the distinctions pointed out by the Commission are well reasoned. Both sides cite *Mackey*. Again, we believe that the Commission's analysis of that case (and the standards applicable to a nonstatutory labor exemption), as adopted by this court in *McCourt*, 600 F.2d 1193 (6th Cir.1979), is sound and that the petitioner's reliance thereon is misplaced under the circumstances.

In sum, we are not persuaded that the legal reasoning of the Commission is erroneous as to the non-applicability of the nonstatutory labor exemption generally under the circumstances of this case. We find the question to be particularly difficult in light of the undoubted desire of petitioners to obtain

labor peace in adopting the restrictions on showroom hours. This desire on the part of the dealers was generated by violence, assaults, vandalism, threats, and pressure from union adherents and many sales personnel to bring about shorter hours and multi-employer bargaining and resultant uniformity. The agreement also came about, in part, upon the advice of labor counsel to petitioners as to the best way to avoid violent confrontation and threats of violence to dealers and to prevent unionization. We agree with the Commission that the process generally was not, nevertheless, a direct product of employer collective bargaining, nor of arm's length dealing with salespersons.

II. *INDIVIDUAL DEALERS WHO ENTERED INTO COLLECTIVE BARGAINING AGREEMENTS AND/OR SHORTENED HOURS UNDER UNION THREATS*

We must next consider whether the above conclusion applies to all of the petitioner dealers. Here we have problems with the legal conclusion reached by the Commission. The record indicates that some of the petitioner dealers entered into collective bargaining agreements with unions representing their sales employees which specified hours of showroom operation. The Commission acknowledged that some dealers did sign such agreements but only a "very few."

We have agreed with the FTC's conclusion generally that the agreement in controversy was not subject to the nonstatutory labor exemption claimed by petitioners. We now consider whether this same conclusion applies to the distinct minority of petitioner dealers who entered into collective bargaining agreements with unions representing their sales employees with specified hours of showroom operation. It is not clear to us under the *factual* findings whether under these several separate collective bargaining agreements there was *bona fide* negotiation and effectual limitation of showroom hours. That

the agreement on showroom operating hours was not reached through bona fide negotiations and was rather a part of preexisting collusion is a legal conclusion, not a factual finding, as to the "few" dealers who signed or entered into union contracts dealing with hours of operation.

The Commission concluded that any such union contract limitation of showroom hours by the few dealers involved "incorporated ... reductions orchestrated by DADA ... [and] simply perpetuated the results of earlier collusion." If, however, direct negotiations and collective bargaining with salesperson employees or their representatives, by any petitioner actually brought about additional or different limits on showroom hours of operation, any such dealer or dealers may well be able to claim a nonstatutory labor exemption.

We believe that a remand is appropriate, therefore, for further Commission consideration on this particular question. Further proof may be presented on this issue, if necessary. Such individual dealer-employee/union negotiations, if in apparent good faith, should not be discounted merely because they brought about an agreement in order to attain labor peace. The important question, as stated by FTC is "whether *bona fide* bargaining took place" with respect to restrictions on hours of operation. (Citing *Zimmerman v. National Football League*, 632 F.Supp. 398). The agreement before the Commission and before us now, without question, is the "agreement among dealers to establish uniform showroom hours," but we find it material for the FTC to consider whether separate dealer-union agreements existed with unions which "contained bargained-for hours restrictions," which were the product of genuine collective bargaining.

The ALJ made extensive fact findings and conclusions concerning individual dealer closeups during weekday evenings and, especially, during Saturdays. The ALJ found that a number

of dealers closed by reason of agreements with a union and others were forced to close due to strikes and union violence. The Commission concluded, however, to the contrary that "it would be improper to impute to the respondents' agreement any protection the nonstatutory exemption may offer individual dealer-employee negotiations." While we agree with the Commission that the dealer's *association*, the collective group of dealers, cannot properly claim the benefit of the nonstatutory exemption for the reasons we have discussed, we disagree that individual dealers should not be carefully considered and examined individually with respect to whether some may actually have negotiated with unions or representatives for shorter showroom hours in good faith (or under force and threats of vandalism, violence, picketing and property damage).

Our remand, then, concerns a requirement that the Commission consider carefully the record and the ALJ findings regarding any individual dealers who may be entitled to claim an exemption under the circumstances of bona fide collective bargaining with a union for shorter showroom hours or as a direct result of ***union directed*** violence and force for shorter showroom hours.[9] The Commission made no adequate analysis

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[9]The ALJ concluded, among other things:

1. "[s]ome closings were in fact collectively bargained;"

2. "[s]everal respondents [petitioners] did negotiate collective bargaining agreements with an hours restraint,"

3. "[t]he record shows that the parties to bargaining agreements treated the shorter hours as a contractual requirement;

4. "[t]he parties to Teamsters' labor contracts, for example, interpreted the 'maintenance of standards' provision in the written collective bargaining agreements to preclude dealers from opening on Saturday;"

5. "[t]he sales employees *and their unions* reinforced their demands for uniform shorter hours by intimidation and violence . . . ." (emphasis added);

of the ALJ factfinding and conclusions in this regard, nor did it state whether or why the ALJ findings were not supported by evidence in the record. See n. 9. In sum, we remand for the Commission to determine whether there was a restraint on hours of showroom operation imposed by a union rather than by the collective agreement with and among the other dealers or the association. *See Richards v. Neilsen Freight Lines*, 810 F.2d 898.

When the Commission overrules the ALJ and substitutes its own findings, we should carefully scrutinize the Commission's determinations of fact, and therefore its conclusions based upon those facts. Our task, however, is to determine whether the Commission's findings are supported by substantial evidence. *Thiret v. FTC*, 512 F.2d 176 (10th Cir.1975). The FTC conclusions will be upheld if supported by such relevant evidence that a reasonable mind might accept as adequate to support that conclusion. *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 143 (1985). We remand for the limited purposes indicated with these principles in mind.

III. *RESTRAINT OF TRADE*

We believe that a Rule of Reason is the preferable analysis to apply to our consideration of petitioners' conduct under § 1 of the Sherman Act. We, therefore, make "an inquiry into the reasonableness of the restraint under the circumstances." *See Mackey*, 543 F.2d at 619.

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of

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6. "[S]ome dealers agreed orally and informally with sales employees ***and their unions*** to meet the demands for uniform shorter hours. This was part of the collective bargaining process" (emphasis added; footnote omitted).

> their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918) (quoted in *White Motor Co. v. United States*, 372 U.S. 253, 261, 83 S.Ct. 696, 700, 9 L.Ed.2d 738 (1963)).

The Supreme Court did not adopt a *per se* analysis of the allegedly anticompetitive conduct involved under an agreement among college members of the NCAA. *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).[10] The FTC con-

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[10]In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), the Court noted that a joint selling arrangement among potential competitors, although seemingly anticompetitive on its face, might provide sufficient operating efficiencies to render the restraint reasonable under the circumstances. In *NCAA v. Board*, 468 U.S. at 103, the Court concluded that it must evaluate and consider under a Rule of Reason petitioners' "justifications for the restraints," and the anticompetitive effect of the action in question.

cludes that "showroom hours are an important form of output and a dimension in which new car dealers clearly compete." We agree with the Commission to the extent that showroom hours may be an area of competition among the dealers.

The Supreme Court has stated that it is slow to condemn rules of associations and agreements defining business relationship "where the economic impact of certain practices is not immediately obvious." *Indiana Federation of Dentists*, 476 U.S. at 459, 106 S.Ct. at 2018. Thus, we are disposed to apply here a Rule of Reason to consider the impact of the limitation of showroom hours upon competition in general, and upon new car customers, in particular, in the Detroit area since the impact appears to us not to be immediately apparent. We look, then, as was the case in *Indiana Federation of Dentists*, to see whether FTC has demonstrated "actual detrimental effects" or "the potential for genuine adverse effects on competition." *Id.* at 460, 106 S.Ct. at 2018. Giving the Commission's conclusion some deference, we, nevertheless, examine its conclusion in light of its findings, as supported by this record, to determine whether petitioners' justifications for their conduct are legitimate, plausible, substantial and reasonable. In this regard, we examine the evidence of the power of petitioners in the relevant market. *See Jetro Cash & Carry Enter. v. Food Distrib. Center*, 569 F.Supp. 1404, 1414 n. 7 (E.D.Pa.1983); *Amjac Ltd. v. Northlake Mall*, 1973-1 Trade Cas. (CCH) ¶ 74,150, at 94,290 n. 5 (N.D.Ga.1973); *Dunkel Oil Corp. v. Anich*, 1944 Trade Cas. (CCH) ¶ 57,306 (E.D.Ill.1944); and *Ohio ex rel. Brown v. Cincinnati Automobile Dealers Ass'n*, 71 Ohio Op.2d 467 (1974).

We first examine the Commission's equation of reduction in hours of operation to reduction in "output." It may be, as stated in another part of the Commission's opinion, that agreed

reduction of showroom operating hours is a limitation upon "a form of competition among dealers," but that is not quite the same thing as a limit upon production or output. The analysis made by the Commission for the proposition resulting in its conclusion of limitation of output and anticompetitive effect is based upon *Mass Bd. of Registration in Optometry*, DICT 9195 (F.T.C. June 13, 1988) The Commission's equation of limited hours and reduction in "output" carried over to its analysis of petitioners' claims of operating efficiency in respect to reducing showroom hours. See note 22 of its decision and its discussion of "cost per unit of output." The analysis concerns three interrelated inquiries:

> 1) Is the restraint "inherently suspect?" ("absent an efficiency justification");
>
> 2) Is there a "plausible" efficiency justification for the practice? (Can it be "rejected without extensive factual inquiry?"); and
>
> 3) Is the justification "really valid?" (Assessed under the "full balancing test of the Rule of Reason").[11]

Based on what it stated was a "common sense approach," the Commission found limitation of showroom hours to be inherently suspect. It found that a car dealer was "a provider of sales and support services," and that its "output" is not

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[11]In note 18 of its decision dealing with this analysis, the Commission makes reference to two recent Supreme Court decisions, *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), which followed a *per se* approach, which the Commission described as a "more traditional line," and then added: "[o]ur method of analysis is consistent with the traditional approach."

measured in terms of units sold.[12] While this might force customers to shift their shopping hours, the commission makes no reference to nearby or suburban car dealers available to many customers not a part of petitioners' association. Citing Robert Bork from *The Antitrust Paradox* (1978), the Commission leaps to the conclusion "there is no economic difference between an agreement to limit shopping hours and an agreement to increase price." Bork himself stated however, while counselling to the contrary, that it is "presumably, more likely that a judge in the Brandeis tradition would uphold an agreement by automobile dealers to close on Sundays than an agreement by the same dealers to add $200 to the price of each car." *Id.* at 85 (1976). Unlike this example cited, there is no showing in this case, and the Commission can claim no reliance on a showing of higher prices or profit margins achieved by petitioners compared to other dealers similarly situated.

The Commission relies on expressions of hope by association representatives that costs would be reduced and that "grosses" would be "improved" and that hours limitation would also bring about "a better buying climate" and "cut down shopping." Whether these expressions or hopes were realized leads us to examine the other inquiries in the three-prong analysis of *Mass. Bd. of Registration of Optometry* utilized by the commission. We believe that the inherently suspect conclusion arises from a per se approach by the Commission absent a demonstrated effect on the price of cars in the Detroit area.[13] The Commission, moreover, cites *FTC*

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[12]The Commission referred to "dicta" from *Jewel Tea* in support of its approach that limitation of hours was inherently suspect or an "obvious restraint." 381 U.S. at 692.

[13]The commission does not contest that "the ALJ found no evidence that the Saturday closing caused an increase in retail prices of cars in the Detroit area, or that the hours reductions increased dealers' gross margins on sales."

v. Indiana Federation of Dentists, 476 U.S. 447, 106 S.Ct. 2009, in support of its analysis, but neglects to note that the Rule of Reason was specifically adopted in that case.

The Commission concluded in note 22 that the "efficiency justifications" presented by the dealers "(1) lower dealer overhead costs, (2) the ability to attract higher-quality sales personnel, and (3) the prevention of unionization" were not "plausible." Although conceding that "dealer overhead may have been reduced," the Commission concluded that "unit costs did not decrease," based on its prior conclusion that there was a reduction in "output," that is, showroom hours of operation. Again, in note 22, the Commission cites *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), in support of its theory, again without recognizing that the Rule of Reason approach, was lauded in that case, which described it as giving "the [Sherman] Act both flexibility and definition . . . [and] focus[ing] directly on the challenged restraint's impact on competitive conditions." 435 U.S. at 688, 98 S.Ct. at 1603. *Professional Engineers*, it should be further noted, bore directly on fees to be charged by the professional association ("a total ban on competitive bidding"), and thus the restraint was found to be subject to a *per se* rule. *Id.* at 696, 98 S.Ct. at 1367. The Commission found, moreover, that preventing unionization could not be "legitimate" justification for competitive purposes because of a "national policy *favoring* the association of employees to bargain in good faith with employers over wages, hours and working conditions." (Emphasis added). We are not sure such a policy, if it exists, precludes this purported justification,[14] but we have agreed with the Commission that

[14]The policy of the NLRA is to enable employees to organize for *collective* bargaining purposes for negotiating wages, hours, and conditions of employment without hindrance from employers or unfair local constraints, statutory or otherwise. Whether this law *favors* such association, or

the dealers' agreement does not come within the nonstatutory exemption, and that acts designed to impede union organization may be antithetical to a national labor policy.

The Commission cites *Indiana Federation of Dentists* to sustain its rationale that limiting showroom hours is inherently suspect and that the offered justifications were not plausible even if prices and profit margins were unaffected by the agreed limitations. While *Indiana Federation of Dentists* was not directly concerned with "price fixing as such," it noted particularly that the practice in question involved "the proposition that making it more costly for the insurers and patients who are the dentists' customers to obtain information needed for evaluating the dentists' diagnoses has [a] procompetitive effect." 476 U.S. at 459, 106 S.Ct. at 2018. The court further noted that

> [t]he premise of the [dentists'] argument is that, far from having no effect on the cost of dental services chosen by patients and their insurers, the provision of x-rays will have too great an impact: it will lead to the reduction of costs [as to the patient or consumer] through the selection of inadequate treatment.

Id. at 463. Through a concerted boycott, dentists in *Indiana Federation of Dentists* denied to their patients and insurers relevant information whereby costs ultimately could be expected to be effected, and thus the Court held that actual price increase was not required to be proven even under a Rule of Reason approach. We perceive some difference between withholding of relevant cost information and restricting

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whether it merely permits such association without unfair restraint or impediment, is another question. The unions which represented salesmen in this case worked hard to effectuate the limitation on showroom hours.

showroom hours, but in deference to the Commission, we are not prepared to hold the analogy to be erroneous.

The Commission concluded that prices may have risen "above competitive levels" even if they remained the same, because "we would expect car prices to have gone down in response to dealers' lower overhead costs." Note 24. Ultimately, the Commission concluded that there was no demonstrated "procompetitive efficiency justification," and thus the dealers' agreement in question "cannot be squared with the antitrust laws."

While we do not agree in all respects with the Commission's rationale, we find some legal basis and support for its conclusions in an area that is murky and unclear. Limitation of hours has been held to be an anticompetitive restraint although relief in that case was limited and the damages to users or customers was found to be "entirely speculative." *Tennessee, ex rel. Leech v. Highland Memorial Cemetery, Inc.*, 489 F.Supp. 65, 68 (E.D.Tenn.1980). We do not equate limitation of hours to price-fixing, but we do not find error in the Commission's conclusion that hours of operation in this business is a means of competition, and that such limitation may be an unreasonable restraint of trade.[15] We also find no error in the Commission's treatment of petitioners' other defenses (except as to II above).

IV. *SCOPE OF RELIEF*

We defer generally to the discretion of the Commission with respect to relief ordered once there has been demonstrated

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[15]Neither do we necessarily agree that "the parties' focus on retail prices misses the point in this case." Under a Rule of Reason analysis effect on prices, output and market forces in a competitive market of a particular practice is frequently relevant and may be determinative. The special factors noted in this case support the Commission's conclusion on restraint of trade despite lack of evidence of increased prices.

an unreasonable restraint of trade. "[T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613, 66 S.Ct. 758, 760, 90 L.Ed. 888 (1946). At the same time, courts have occasion to review the extent and scope of remedies ordered and have found them to be over broad or unjustified. *See Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294 (7th Cir.1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980); *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212 (9th Cir.1979); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir.1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977).

We find no error in parts I and II of the attached Commission final order issued February 22, 1989. As to part III requiring each dealership to operate for sales purposes "a minimum of 64 hours per week . . . for a period of one year," we have concern that such an order is overly board and intrusive on the manner of operation, and without a reasonable relation to the practices condemned. We suggest that the Commission consider giving dealers an option to maintain showroom hours for at least an *average* of ten and a half hours a day during weekdays, coupled with operation on Saturdays for some minimum additional time for the one year period. This might serve as a permissible option to the mandated 64 hour week specified in part III, which we question as *reasonably* related to the improper practices determined.

We find no error in parts IV, V, and VI of the final order. We find no error in part VII A, B and C but direct that the Commission consider further whether 30 days is sufficient time to investigate a complaint, have a minimal hearing, and record the findings before expelling a purported violator. We take this remand action under our authority to "modify or set aside orders of the Commission." 15 U.S.C. § 45(d).

We find no error in parts VIII, IX, X, and XI of the final order.

We thus **AFFIRM** the Commission generally in this close and difficult case. We **REMAND** for limited purposes set out in part II, and for consideration of parts III and VIID of the final order on remedy.

RYAN, Circuit Judge, concurring in part and dissenting in part. In my view, the Federal Trade Commission's decision should be affirmed in its entirety. Although I will discuss my disagreement with the majority opinion in some detail, I note at the outset two overriding and related concerns.

I.

First, the scope of our review of the FTC's determinations in this case is very limited. "[F]indings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). The court "must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S.Ct. 2009, 2015, 90 L.Ed.2d 445 (1986) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct. 456, 458, 95 L.Ed. 456 (1951)). Legal conclusions are "for the courts to resolve," but courts must give "some deference" to the Commission's interpretation of the statute it is charged with enforcing. *Indiana Fed'n of Dentists*, 476 U.S. at 454, 106 S.Ct. at 2015. Thus, we properly ask only whether the FTC's interpretation is "reasonable, consistent, and persuasive." *Whiteside v. Secretary of Health & Human Services*, 834 F.2d 1289, 1292 (6th Cir.1987). Respectfully, I do not believe the majority opinion satisfactorily adheres to these standards for review.

My second concern is that the majority opinion fails to offer any valid reasons for rejecting the FTC's factual findings and legal conclusions.

While I agree with the majority's conclusion that the nonstatutory labor exemption from the antitrust laws does not apply to the agreement among the dealers to restrict their hours of operation, I do not agree with the analysis employed

in the rest of the opinion or with the order remanding the case to the FTC to essentially do once again what it has already done. In my view, the FTC's decision is well-reasoned and correct. I would affirm it in its entirety. Therefore, I concur in part I of the majority opinion and in the result in part III, and respectfully dissent from parts II and IV of the opinion.

II.

In part II, the majority orders a remand to the FTC for the "limited purpose [ ]" of determining whether individual dealers might be able to take refuge under the nonstatutory labor exemption as the result of their "direct negotiations and collective bargaining with salesperson employees or their representatives. . . ." On remand, the Commission is to "consider carefully the record and the ALJ findings regarding any individual dealers who may be entitled to claim an exemption under the circumstances of bona fide collective bargaining with a union for shorter showroom hours or as a direct result of *union directed* violence and force for shorter showroom hours." I can conceive of no reason, indeed no lawful basis, to order remand on this question since it is readily apparent that the FTC has already considered, and rejected, the dealers' position on this factual issue.

In addition to finding that the dealers' agreement to restrict hours was not protected by the nonstatutory labor exemption, the FTC found that collective bargaining agreements signed by a few dealers, which also restricted hours of operation, were also not protected:

> [T]hese agreements ... did not establish *bargained-for* showroom hours. The agreements merely incorporated, by means of maintenance of standards provisions, the pre-existing hours reductions orchestrated by DADA. Thus, those agreements did not

> memorialize hours limitations negotiated between dealers and employees; they simply perpetuated the results of earlier collusion.

In determining whether the nonstatutory labor exemption applied, the FTC used the correct legal analysis as "[t]he important question is whether *bona fide* bargaining took place such that the policies in favor of such bargaining should take precedence over antitrust concerns." *Zimmerman v. National Football League*, 632 F.Supp. 398, 408 (D.D.C.1986); *see also Mackey v. National Football League*, 543 F.2d 606, 614 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). *Bona fide* bargaining does not occur where one party unilaterally imposes a provision on a weaker party or where the agreement merely incorporates a preexisting rule. *See Mackey*, 543 F.2d at 613, 615-16.

In this case, the FTC found as a fact that the agreement on hours had not been reached through *bona fide* negotiations but instead was merely the incorporation of the preexisting collusion. This factual finding that the "maintenance of standards" provisions were not the result of arm's length negotiations should be determinative. 15 U.S.C. § 45(c). The majority opinion, however, states:

> It is not clear to us under the *factual* findings whether under these several separate collective bargaining agreements there was *bona fide* negotiation and effectual limitation of showroom hours. That the agreement on showroom operating hours was not reached through *bona fide* negotiations and was rather a part of pre-existing collusion is a legal conclusion, not a factual finding, as to the "few" dealers who signed or entered into union contracts dealing with hours of operation. . . . If . . . direct negotiations and collective bargaining with salesperson employees

> or their representatives, by any petitioner actually brought about additional or different limits on showroom hours of operation, any such dealer or dealers may well be able to claim a nonstatutory labor exemption.

The majority is correct that "if" arm's length negotiations on hours occurred, such activity would be protected. It fails, however, to suggest any reason why the FTC's finding that no such arm's length negotiations occurred should not be accepted and, indeed, binding. The Commission specifically found that while the provisions "effectively prohibited some individual dealers from *extending* their hours of operation . . . [they] did not have the effect of requiring dealers to close on Saturday unless they were already doing so when the contract was signed." Thus, the Commission found that any agreement between individual dealers and their employees or any union to reduce or restrict the hours of operation merely incorporated the preexisting agreement the dealers reached among themselves and was not the result of *bona fide* bargaining. That is a finding of fact, and it is supported in the evidence. Indeed, the majority does not hold that the FTC's finding in this matter is not supported by substantial evidence. Rather, the dealers are simply given another chance on remand to litigate an issue already decided by the Commission and supported by evidence in the record. For this reason, I respectfully dissent from part II of the majority opinion remanding this action to the FTC for reconsideration on the question of whether individual dealers may be able to claim antitrust immunity under the nonstatutory labor exemption.

III.

I also disagree, for two reasons, with the majority's analysis in part III holding that the Commission erred in employing a *per se* analysis instead of the rule of reason. First, the FTC

did not use a *per se* analysis in analyzing whether petitioners' conduct resulted in a restraint of trade. Second, I do not agree that the Commission should have conducted a full rule of reason analysis in this case.

In deciding which analysis to employ, the FTC observed that in recent cases, *Indiana Fed'n of Dentists*, 476 U.S. 447, 106 S.Ct. 2009; *NCAA v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); and *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), the Supreme Court, instead of applying the *per se* label to restraints which arguably fit within the traditional *per se* analysis, considered the competitive justifications for the restraints without employing the full market analysis necessary for a rule of reason analysis. The FTC thus concluded that "*BMI, NCAA* and *IFD*, read together, suggest that the *per se* rule and the rule of reason are converging." The FTC, *quoting Massachusetts Board of Registration in Optometry*, FTC Docket No. 9195, slip op. at 12-13 (June 13, 1988), summarized the three-step inquiry it believed was mandated by the converging rules:

> First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a second question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or

> enhancing competition (*e.g.*, by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition.

The FTC explained that it used this analysis because it "focus[es] on the economic realities and substantive concerns about competition that ultimately must govern our decisions." The FTC then found, under the first inquiry, that the agreement was inherently suspect as a limitation on output and, under the second inquiry, that there were no plausible efficiency justifications for the agreement. Finding the restriction invalid under the second inquiry, the FTC did not reach the third inquiry's full-blown economic analysis.

Although the *result* reached by this analysis is the same as would have been reached under the *per se* rule—the agreement was found illegal without resort to full economic analysis—the FTC did not use a *per se* analysis. Under a *per se* analysis, the agreement would have been invalid without any consideration of its procompetitive effects. The FTC, however, did consider the efficiency justifications offered by the respondents before concluding that the agreement had an anticompetitive effect.

Though the majority never concedes the existence of the three-prong "merged" analysis, I believe that this approach is a sensible one. As the Supreme Court observed, "there is often no bright line separating per se from Rule of Reason analysis." *NCAA*, 468 U.S. at 104 n. 26, 104 S.Ct. at 2962 n. 26. Under both rules, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *Id.* at 104, 104 S.Ct. at 2961. The merged approach, which recognizes this essential similarity, makes sense because it allows consideration of the economic and efficiency justifications of traditionally *per se* illegal practices, without the often unnecessary, cumbersome and complicated analysis of the rule of reason. The Supreme Court has recognized that a full rule of reason analysis may not be necessary where the anticompetitive effect is obvious. *Indiana Fed'n of Dentists*, 476 U.S. at 459-60, 106 S.Ct. at 2018-19; *NCAA*, 468 U.S. at 109, 104 S.Ct. at 2964; *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). If the justification for the horizontal restraint in dispute is clearly implausible, condemnation of the practice should not be delayed until, under the rule of reason approach, "all aspects of definition, market power, intent, and net competitive effect have been analyzed—a process that many consider to be the antitrust equivalent to Chinese water torture." *Massachusetts Board*, slip op. at 10-11. The FTC found that the hours of operation agreement reduced output and that the respondents offered no plausible economic justification for this agreement. It is eminently sensible that the FTC ended its inquiry there instead of engaging in a rule of reason analysis described by the Supreme Court as " 'an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries ... an inquiry so often wholly fruitless when undertaken.' " *BMI*, 441 U.S. at 8 n. 11, 99 S.Ct. at 1556

n. 11 (quoting *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958)).

I also disagree with that portion of part III of the majority opinion wherein the issue of the economic analysis and classification of the dealers' agreement to restrict on the hours of operation is discussed. The FTC, under the first step of the three-prong analysis, concluded that the agreement to restrict hours of operation was inherently suspect as a limitation on output. The majority rejects this conclusion:

> It may be, as stated in another part of the Commission's opinion, that agreed reduction of showroom operating hours is a limitation upon "a form of competition among dealers," but that is not quite the same thing as a limit upon production or output. The analysis made by the Commission for the proposition resulting in its conclusion of limitation of output and anticompetitive effect is based upon *Mass Bd. of Registration in Optometry*, DICT # 9195 (F.T.C. June 13, 1988). The Commission's equation of limited hours and reduction in "output" carried over to its analysis of petitioners' claims of operating efficiency in respect to reducing showroom hours. . . .
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>
> Based on what it stated was a "common sense approach," the Commission found limitation of showroom hours to be inherently suspect. It found that a car dealer was "a provider of sales and support services," and that its "output" is not measured in terms of units sold. (Footnote omitted.) While this might force customers to shift their shopping hours, the commission makes no reference to nearby or suburban car dealers available to many

> customers not a part of petitioners' association. Citing Robert Bork from *The Antitrust Paradox* (1978), the Commission leaps to the conclusion "there is no economic difference between an agreement to limit shopping hours and an agreement to increase price." . . . Unlike this example cited, there is no showing in this case, and the Commission can claim no reliance on a showing of higher prices or profit margins achieved by petitioners compared to other dealers similarly situated.

I disagree with the majority opinion because I find the FTC's reasoning persuasive, and because the majority fails to give any reasons for rejecting the FTC's conclusion.

The FTC first used common sense, an appropriate basis for agency decisionmaking, *Indiana Fed'n of Dentists*, 476 U.S. at 456, 106 S.Ct. at 2016, to show that a mandatory reduction in hours was a limitation on output:

> A consumer may consider any number of factors in deciding where to shop, including price, selection, location, reputation, and service, but surely one of those factors is whether the business provides hours that are convenient to the consumer's schedule. If several competitors are identical in all respects except the business hours they offer, the consumer will choose which ones to patronize on the basis of that difference; the consumer is unlikely to remain indifferent.

The FTC's analysis makes sense when applied to the new car market. Each line dealership sells identical cars. A consumer will patronize a particular dealership because it offers the manufacturer's product, the car, in a better package. That package, which may include a better price, better service on

the car, and greater convenience in purchasing the car through extended hours, is the dealer's product. Moreover, these common sense observations are supported by case law. In *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 692, 85 S.Ct. 1596, 1603, 14 L.Ed.2d 640 (1965), the Supreme Court recognized that limitations on hours of operation are an "obvious restraint on the product market." Other courts have agreed that limiting hours eliminates one form of competition. *Jetro Cash & Carry Enter., Inc. v. Food Distribution Ctr.*, 569 F.Supp. 1404, 1415 (E.D.Pa.1983); *Leech v. Highland Memorial Cemetery*, 489 F.Supp. 65, 68 (E.D.Tenn.1980).

Economic theory also supports the FTC's conclusion that restricting hours restricts the product market:

> We presume that consumers allocate their time in the manner they think is most efficient or beneficial to them. By completely eliminating certain shopping hours, the respondents' agreement forces consumers to shift their car shopping to hours they otherwise would not have chosen for that activity. The forced restructuring of their schedules raises the opportunity cost to consumers of car shopping. This increase in costs encourages consumers to spend less time comparing prices, features, and service, and thereby reduces pressure on dealers to provide the prices, features, and services consumers desire. And even if the amount of time spent shopping remains unchanged, the restriction reduces efficiency, since without it consumers could reorganize their activities in a way that would increase their overall satisfaction.

Former Circuit Judge Robert Bork agreed with this characterization when he compared an agreement among car

dealerships to raise prices by $200 and an agreement by dealers to close on Sundays. Although some courts would traditionally be more likely to condemn the price fixing agreement, Judge Bork points out that the two are indistinguishable:

> Both are limitations upon competition whose sole purpose is to increase the dealers' income by restricting output. The output in one case is the number of cars sold (which will decrease with the raised price); the output in the other case is the provision of convenience of shopping to consumers (which will decrease with the Sunday closing). . . . From the consumers' point of view such agreements are . . . indistinguishable. Consumers who lose the convenience of shopping on Sunday are deprived of something that is as much an economic good as is money. There is no acceptable way for a judge to decide that a restriction in the offering of a convenience is any less objectionable than a restriction in the number of automobiles sold.

Bork, *The Antitrust Paradox* 85-86 (1978). I find this economic analysis, upon which the FTC could properly rely, *Indiana Fed'n of Dentists*, 476 U.S. at 456, 106 S.Ct. at 2016, convincing.

Finally, and most importantly, the record supports the FTC's position. The FTC quotes letters from DADA to dealers showing that the "respondents expected the hours restriction to benefit them by limiting comparison shopping." One letter from a DADA executive informed a dealer that the evening closing hours were popular with dealers because "with fewer shopping hours, the public can devote less time to shopping, and consequently forcing down prices." Another letter stated that "the line groups with 100% cooperation have found that this program minimizes shopping by prospective buyers."

In addition to the letters, the FTC noted that dealers consistently fought the DADA evening closing program and that the dealerships of no other metropolitan area were closed on Saturdays. The FTC concluded that "[t]he former factor suggests that some dealers in Detroit see a competitive advantage in keeping longer hours than their rivals, and the latter suggests that in cities where there is no agreement to keep showrooms closed, competitive forces lead dealers to keep them open."

Questions concerning the competitive effects of a policy are factual. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir.1986), *cert. denied*, 481 U.S. 1038, 107 S.Ct. 1975, 95 L.Ed.2d 815 (1987). These factual findings of the FTC, supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Universal Camera*, 340 U.S. at 477, 71 S.Ct. at 458, should have been determinative of the issue that the dealers expected to restrict output by limiting hours of operation. 15 U.S.C. § 45(c).

In the end, the majority, while "not agree[ing] in all respects with the Commission's rationale," grudgingly admits that there was no error "in the Commission's conclusion that hours of operation in this business is a means of competition, and that such limitation may be an unreasonable restraint of trade." Because common sense, economic theory, and the record support the FTC's conclusion that the dealers' agreement to restrict their hours of operation was an inherently suspect limitation on output, I disagree with the majority's rejection of that conclusion as well as their unnecessary resort to a rule of reason analysis.

IV.

My final area of disagreement involves part IV of the majority opinion, where it is "suggested" that the FTC "consider giving dealers an option to maintain showroom hours for at least an *average* of ten and a half hours a day during weekdays, coupled with operation on Saturdays for some minimum additional time" and "consider further whether 30 days is sufficient time to investigate a complaint, have a minimal hearing, and record the findings before expelling a purported violator."

The courts of appeals are permitted to "affirm, enforce, modify, or set aside orders of the Commission. . . ." 15 U.S.C. § 45(d). In examining an FTC remedy, however, a court's review is limited and "extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy." *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612, 66 S.Ct. 758, 759, 90 L.Ed. 888 (1946). "[T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Id.* at 613.

In my view, the FTC's order that the dealers stay open for sixty-four hours per week for a one-year period is "reasonably related" to the unlawful hours of operation agreement. The sixty-four hours per week requirement arose from the FTC's effort not to burden the respondents with inflexible and inefficient requirements, such as complaint counsel's recommendation of specified mandatory hours of operation, while addressing complaint counsel's concerns that without affirmative relief,

> there is no realistic prospect of restoring showroom hours competition to the Detroit market. Dealers individually will decide to remain closed for fear of

> reprisals if they try to extend hours. Only if many dealers are open at the same time, making enforcement of the restriction difficult or impossible, will the fear of being singled out for enforcement be overcome.

The FTC's order governed only the total number of hours, "restoring the benefits the market would provide consumers absent the respondents' restraint of trade—more convenient shopping and additional leisure time—without forcing dealers to remain open at specifically-mandated hours that may be less beneficial to them than other currently unused hours." The choice of sixty- four hours is reasonable as that figure reflects the average of weekly hours in other Midwestern metropolitan areas where free competition exists.

After observing that the courts will not interfere with an agency-ordered remedy except where the remedy selected has no reasonable relation to the unlawful practices found to exist, the majority promptly interferes with the FTC's hours-of-operation remedy, asking the FTC to consider another proposed option. The problem is that while the majority "questions" whether the FTC's chosen remedy is reasonably related to the dealers' agreement to restrict hours, it fails to find any error requiring this court to modify or set aside the order.

The cases cited by the majority to support the ordered remand involve overly broad or vague Commission orders in matters of false advertising or deceptive trade practices and do not support its intrusion on the proper province of the FTC in this case. The court in *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 308 (7th Cir.1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980), addressed the faulty application of a remedy to the facts of a case; *Trans World Accounts, Inc. v. FTC*, 594 F.2d 212, 216- 17 (9th Cir.1979),

involved a failure by the FTC to fashion a clear and precise remedy; and in *Beneficial Corp. v. FTC*, 542 F.2d 611, 618-20 (3d Cir.1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), the court was concerned with an overly broad prior restraint of speech violative of the first amendment. None of those concerns is present in this case. Moreover, in each of these cases the court found specific errors in the FTC order and, therefore, remedied the erroneous portion of the order or remanded the case for clarification or other specific action by the Commission.

The majority opinion, on the other hand, finds no error, factual or legal, in the FTC order requiring the maintenance of sixty-four hours of showroom operation per week and merely suggests an alternative approach for the Commission to "consider" on remand. There is no warrant for disagreeing with the FTC on this issue when no finding is made that the Commission's decision or order was erroneous. To the extent that the majority finds no fault with the Commission's findings, but nevertheless remands this matter for reconsideration of the ordered remedies with the suggestion that the court has a better idea, it acts beyond its judicial authority.

For these same reasons, I also disagree with the majority's direction to the FTC to consider whether thirty days is sufficient time to investigate a complaint and conduct a hearing. Again, there is no finding of error, no finding of abuse of discretion, and no finding of the lack of substantial evidence. The FTC apparently found thirty days to be sufficient time for these matters. We have no authority—as distinguished from "power"—to question the FTC's decision in this regard or to direct the Commission to "rethink" this matter. It is not the task of this court to instruct the FTC on how to carry out its mission. We sit for the limited purpose of reviewing the legality of the Commission's actions, not to advise it on

"fairer" results or procedures. For these reasons, I strongly but respectfully dissent from part IV of the majority opinion.

V.

In conclusion, I would enforce the FTC's order in its entirety because the Commission's findings of fact are supported by substantial evidence and its conclusions of law are not erroneous.

APPENDIX 2

In the Matter of
DETROIT AUTO DEALERS ASSOCIATION, INC., a corporation, et al.

Docket No. 9189

February 22, 1989

OPINION OF THE COMMISSION

BY OLIVER, *Chairman:*

The question presented in this case is whether an agreement among new car dealers in the Detroit metropolitan area to close dealer showrooms on Saturdays and on three weekday evenings is an unlawful restraint of trade. The respondents are the Detroit Auto Dealers Association, Inc. ("DADA"), its executive vice president, several line associations (groups of dealers selling the same make of car), numerous dealerships, and numerous individual owners and operators of dealerships.

The complaint, issued on December 20, 1984, charges that the respondents' agreement to keep showrooms closed all day Saturday and on Tuesday, Wednesday, and Friday evenings is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[1] Admin-

[1]Paragraph 5 of the complaint, which charged that respondents enforced the showroom hours agreement through acts of violence and intimidation, was dismissed without opposition at the close of complaint counsel's case-in-chief for lack of evidence linking such acts to the respondents. Count II, which charged that respondents agreed to restrict the advertising of new cars, was settled by consent agreement with some respondents and dismissed as to other respondents. Those parts of the complaint are not involved in this appeal.

istrative hearings in 1986 produced over 5,000 pages of testimony and almost 4,000 exhibits. On July 14, 1987, Administrative Law Judge James P. Timony issued his initial decision. He dismissed the complaint, finding that the hours restriction was immune from antitrust scrutiny by virtue of the nonstatutory labor exemption to the antitrust laws. The ALJ also found that the agreement had only a remote and insignificant effect on competition. Complaint counsel appeal, contending that the ALJ stretched the nonstatutory labor exemption beyond its accepted limits and that he erred in finding no effect on competition. We agree with complaint counsel and reverse the ALJ.

I. The Facts

A. *The Respondents*

The Detroit Auto Dealers Association, Inc. ("DADA") is a membership organization whose function is to promote the business interests of new car dealerships. IDF 5.[2] All of the dealerships named as respondents in this proceeding, as well as almost all other Detroit-area domestic and import dealers, are members of DADA. IDF 1, 4. The respondent dealerships are also members of their respective line associations. The line groups, like DADA, promote the business interests of their members (*e.g.*, through cooperative advertising programs), but their efforts are limited to a particular make of car.

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[2]References to the record are abbreviated as follows:

ID	— Initial Decision
IDF	— Initial Decision Finding
IDC	— Initial Decision Conclusion
CX	— Complaint Counsel's Exhibit
RX	— Respondents' Exhibit
CAB	— Complaint Counsel's Appeal Brief
RAB	— Respondents' Answering Brief
CRB	— Complaint Counsel's Reply Brief

DADA is managed by a board of directors consisting of one representative from each line group having at least seven DADA members. IDF 6. An executive vice president implements the policies of the board. IDF 8.

B. *History of Dealer Closings*

The development of the restriction on evening and Saturday showroom hours is well documented in the minutes of meetings of DADA and the line associations, as well as in ads that were placed in local newspapers to announce changes in hours. The ALJ reviewed this evidence in great detail and we need only summarize it here.[3]

Until 1959, new car dealerships in the Detroit metro area were open for business on Saturday and every weekday evening. IDF 9. The movement to limit hours of operation began in June of that year when DADA's board of directors, saying that it had devoted "considerable time and thought to the subject of evening closings," announced that it was recommending closing on Wednesday and Saturday evenings effective July 1, 1959. RX 2A. DADA sent a letter to that effect to each member and, in July and August, placed ads in the *Detroit News* and *Detroit Free Press* to alert the public that dealers were now closing at 6:00 p.m. on Wednesdays and Saturdays. IDF 11, 12. By the middle of August, over 70% of the dealers surveyed by DADA were closing on those two evenings, including all of the dealers for four makes of cars and all but one dealer for five other makes. IDF 13. The following year, dealers for three more makes voted at line association meetings to join in the Wednesday and Saturday evening closings. IDF 14-16. The hours limitation had achieved widespread success by the end of 1960. IDF 18.

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[3]We adopt the ALJ's findings of fact to the extent that they are not inconsistent with this opinion.

In October 1960, DADA wrote its members that the Wednesday and aturday evening closings had "proven to be very worthwhile" and asked whether members were in favor of closing on Friday evenings as well. CX 112. After receiving a favorable response, DADA directors met with line group presidents and dealers at DADA headquarters on February 23, 1961. The next day, DADA announced that the participants had agreed to recommend closing on Friday evenings beginning March 3, 1961. IDF 22. Lincoln-Mercury dealers, who had already begun closing Friday evenings, were quickly joined by Plymouth, Dodge, Oldsmobile, Buick, and Chevrolet dealers. CX 121A, CX 405. Later in 1961, Ford dealers announced that they would add Fridays to their Wednesday and Saturday night closings. IDF 25. To assist in this change, DADA provided each of its members with a sign stating: "This dealership closes at 6:00 p.m. on Wednesdays, Fridays, and Saturdays." IDF 22.

For the next few years, respondents concentrated on preserving the status quo. At a meeting on November 13, 1962, DADA's board discussed fifteen Ford dealers who were staying open late on Fridays and concluded that the directors themselves should "contact the offending ... dealers and try to persuade them to resume their closing on Friday evenings." IDF 27. In April 1964, in response to a dealer's assertion that fifty percent of local dealers were open on Friday evening, the board held "a lengthy discussion of the ways and means by which DADA could police the evening closing program" and agreed that a survey should be taken. CX 153A. Contrary to the dealer's assertion, the survey showed 88% of DADA members in compliance with the evening closing program. IDF 29. Nevertheless, efforts to bring the remaining members into compliance continued, including a plan to circumvent uncooperative dealers by advertising the DADA-approved hours directly to the public. DADA's executive vice president sent a memo to several board members on April 21, 1965, saying:

> We are continuing our efforts to get all DADA members to close their dealerships at 6:00 p.m. on Wednesdays, Fridays, and Saturdays.
>
> To that end we are attempting to determine which dealers are remaining open. After we learn this, we plan to write to each one soliciting his cooperation. If that fails, we will place advertisements in the suburban newspapers which cover the areas in which the uncooperative dealers are located, stating that new car dealers in Wayne, Oakland, and Macomb counties close at 6:00 p.m. on Wednesdays, Fridays, and Saturdays.

IDF 31. This plan was carried out over the summer of 1965. IDF 32-33. In fact, in July, DADA announced to the public that it had "established" 6:00 p.m. as the closing hour on Wednesday, Friday, and Saturday evenings for "all new car dealerships." CX 3300.

In 1966, respondents extended the evening closing program to Tuesdays. A September 27, 1966 letter by DADA's executive vice president described the development of the hours restrictions up to that point:

> By way of background, we first discussed [evening closings] in a Directors' Meeting in April, 1959. We continued to discuss it, and finally, in June of that same year, adopted the policy of closing at 6:00 p.m. on Wednesday and Saturday evenings. . . .
>
> The closing program continued with varying degrees of success until March, 1961, when it was decided to close Friday evenings, as well as Wednesday and Saturday evenings.
>
> We remained on Wednesday, Friday and Saturday evening basis [sic] until July of this year when

> the subject of closing on Tuesday evenings began to be discussed. Four line groups (Cadillac, Chevrolet, Lincoln-Mercury and Rambler) agreed to close that evening on a line-group basis. The majority of our imported car members also agreed to close on that evening and some Buick and Oldsmobile members started closing but on an individual basis.
>
> We feel that this Tuesday closing will gain momentum and that it is just a question of time until the great majority of our dealers will close on that evening.

CX 172A. Shortly thereafter, the Chevrolet line group received a report that DADA was encouraging dealers to close on Tuesday evenings. CX 310A. The following February, DADA's board of directors resolved to recommend that all members not already closed on Tuesday evening begin closing on that evening, effective immediately. CX 84A-B.

The final stage of the respondents' hours reductions, and the one that took the longest to accomplish, was the closing of showrooms during the day on Saturday. At first, dealers considered shortening or limiting Saturday hours only during the summer months. These discussions bore fruit in 1969, when Dodge, Chrysler-Plymouth, Pontiac, Buick, Oldsmobile, and Lincoln-Mercury dealers decided to close on Saturday for the summer. IDF 40-41. They were joined the following year by Ford and Chevrolet dealers, who agreed to close Saturdays in July and August. IDF 42, 43. It was three more years before dealers moved to close Saturday year-round. By the end of November 1973, the Dodge, Chevrolet, Buick, Oldsmobile, Ford, Lincoln-Mercury, and Chrysler- Plymouth dealers all had agreed to close Saturdays beginning December 1, 1973. IDF 48-50.

In short, over the course of fourteen years, metro Detroit new car dealers, acting through their line associations and DADA, reached agreements that cumulatively resulted in the closing of dealer showrooms on Tuesday, Wednesday, and Friday evenings and all day Saturday. Since about December 1, 1973, the vast majority of Detroit area dealerships have been closed at those times. Detroit is now the only metropolitan area in the United States in which almost all new car dealerships are closed on Saturdays. IDF 53. Only eight out of 231 dealerships have regular Saturday hours year-round, and only seven remain open after 6:30 p.m. for three or more nights per week. IDF 51-52.

C. *History of Labor Activity*

Respondents do not dispute the fact of these joint hours reductions. They contend, however, that the agreements to reduce hours were made in response to periodic efforts by labor unions to organize sales employees at metro Detroit new car dealerships. Respondents introduced extensive testimony and exhibits on the unionization efforts. As with the history of dealer closings, we need only summarize the ALJ's review of that evidence here.

Labor unions first turned their attention to Detroit-area automobile dealerships in the 1940s. IDF 76. The Teamsters union concentrated on the "front end" of the dealerships (the sales departments), while the United Auto Workers sought to organize the "back end" (the service departments). IDF 78. The Teamsters managed to organize several Ford and Lincoln-Mercury dealers before World War II, but ultimately no contract came of it. IDF 76-77. The UAW also organized a few dealerships and in 1947 instigated a lengthy, violent strike of service shop employees in order to pressure dealers into multi-employer bargaining. IDF 80-81, 85-87. Although the

UAW strike involved service employees, it apparently left dealers apprehensive about the prospect of further union disputes. IDF 88.

No further attempts were made to organize sales employees until 1954. Most metro Detroit dealerships at that time were open from 9:00 a.m. to 9:00 p.m. Monday through Friday, and from 9:00 a.m. to 6:00 p.m. on Saturday, a total of 69 hours per week. IDF 92. Some dealers required sales employees to work all hours the dealership was open. IDF 96. Other dealers used split shifts or other systems to limit individual employees' work hours, but employees at those dealerships nevertheless felt pressure to be present during all showroom hours. That pressure arose from their fear of losing customers, and therefore commissions, to fellow salesmen.[4] IDF 101, 120-121.

Early in 1954, the Teamsters launched a campaign that eventually attracted some 2,700 sales employees. IDF 105-106. One of the union's primary recruiting tools was a demand for a shorter work week. IDF 107. To sales employees, a shorter work week meant fewer showroom hours, because they viewed the latter as essentially controlling the former. IDF 102. Moreover, to them, it also meant *uniform* showroom hours, because salesmen feared skating between dealerships if some dealers remained open longer than others. IDF 103-104.

A uniform shorter work week, however, was not the Teamsters' only demand. Another key demand was multi-employer bargaining. IDF 109. Multi-employer bargaining is a process in which independent employers negotiate as a unit

[4]The phenomenon of losing a customer to another salesman is known in industry jargon as "skating." Skating occurs when, for instance, a customer negotiates with one salesman, returns to the dealership when that salesman is not in the showroom, and closes the deal with a different salesman, who then claims the commission due on the sale. IDF 100.

with a union representing employees of each of the employers. As noted by the ALJ, multi-employer bargaining can be an effective way for unions to achieve uniformity of wages, hours, and working conditions. IDF 71. A multi-employer labor pact can make it easier to organize workers or to implement an industry- wide strike, and therefore increases a union's bargaining power. IDF 71-72. For these reasons, unions attempting to organize Detroit-area dealerships consistently sought multi-employer bargaining. IDF 75.

The parties agree that the respondents in this case wanted to avoid unionization. Accordingly, the dealers' labor counsel advised them to resist multi-employer bargaining, which might have given the Teamsters additional leverage. IDF 89. Counsel further advised that the best way to avoid multi- employer bargaining was for the dealers to present a united front to the union and to make uniform concessions to sales employees. *Id.* At trial, labor counsel testified that they advised dealers that concessions to labor could provoke unionization if the concessions were not uniform. IDF 91.

The Teamsters union struck several dealerships in late 1954, pressing its demands for multi-employer bargaining, higher commissions, and a uniform shorter work week. IDF 107-09, 112. The union withdrew many of its election petitions, however, after the National Labor Relations Board refused jurisdiction over the dealers. The union was defeated in most of the remaining elections, and the organizational drive essentially collapsed. IDF 113.

The next major Teamsters campaign began in 1959 and continued into 1960, when a new, competing union, the Salesmen's Guild of America, also entered the picture. IDF 124, 128. Both unions made demands similar to those presented in 1954: multi-employer bargaining, uniform five-day work weeks, higher commissions, and other benefits. IDF 126,

128-130. Dealers discussed these demands at line group meetings. IDF 136. In September 1960, the line groups recommended that dealers adopt "minimum employment standards" covering such things as paid vacations, minimum commissions, demonstrator programs, shorter work weeks, and group insurance. These minimum standards were designed to match most of the union demands. *Id.*; RX 807C, 809. The dealers hoped to head off the unions by making these concessions, and the strategy was successful; by December 1960, both the Guild and the Teamsters had lost almost all of their representation elections. IDF 144-145.

By the mid-1960s, most dealerships were closed on Wednesday, Friday, and Saturday evening, but sales employees continued to complain about the length of the work week. IDF 151. A new union, the Automotive Salesmen Association, started recruiting in early 1966, with evening and Saturday closings as a primary objective. IDF 152-153. Like the Teamsters and the Guild before it, the ASA also demanded that the dealers form a city-wide multi-employer bargaining unit. IDF 157. The ASA called a brief strike at the beginning of March 1967. According to a contemporary report in the *Automotive News*, the motivation for the strike was the dealers' refusal to engage in multi-employer bargaining. RX 821C-D.

There were also a number of strikes during negotiations with individual dealerships in 1967 and 1968. IDF 190. Some of these were lengthy, and many of them involved violence, threats of violence, and vandalism. IDF 186. According to the president of the ASA, most of the strike issues were "bread and butter" issues, including not only hours but also earnings, benefits, job security, and working conditions. RX 728C. Since most dealerships were by then closed four nights a week, the question of shorter hours focused on Saturdays. IDF 193.

The ASA eventually won elections at about 100 dealerships, but managed to sign and ratify contracts at only 29 of them. RX 843. Although the union attempted to negotiate an end to Saturday work at organized dealerships, it was not successful. IDF 167-169. In fact, most of the contracts expressly reserved to management the right to determine the business hours of the dealership. CX 3604B, 3605F, 3607F, 3608F, 3609G, 3610R, 3612R, 3613S-T, 3614B, 3615M. Nevertheless, salesmen continued to complain about working Saturdays. IDF 195, 199. In June 1969, the ASA sponsored a rally and a demonstration in front of DADA headquarters to demand an end to Saturday work. IDF 177. The following year, salesmen petitioned DADA to urge dealers to close on Saturdays. IDF 219. DADA refused, since taking any such action in response to an employee request might inadvertently have led to a requirement that the dealers engage in multi-employer bargaining. *Id.*

In 1971 the ASA affiliated with the Teamsters union. IDF 205. The Teamsters continued ASA's organizational efforts, making Saturday closings its principal recruiting tool. IDF 206. In the next couple of years the Teamsters struck several individual dealerships and picketed non-union dealerships on Saturdays, demanding a uniform five-day work week. IDF 211-218, 220-224, 239. Threats, physical assaults, and property damage were common. IDF 210, 212-217, 221, 226-227. Some dealers attempted to satisfy their sales personnel by splitting shifts or offering to close on a day other than Saturday, but they were apparently unable to resolve the salesmen's complaints. IDF 235-237.

The Teamsters tried to achieve Saturday closings at organized dealerships through formal collective bargaining, but without much success. Some dealers did agree to a "maintenance of standards" provision, which required the employer to con-

tinue the wages, hours, and working conditions in effect at the time the agreement was signed. IDF 229-231. These provisions effectively prohibited some individual dealers from extending their hours of operation. IDF 230, 288. The maintenance of standards provisions, however, apparently did not have the effect of requiring dealers to close on Saturday unless they were already doing so when the contract was signed.

Detroit-area dealers discussed the Teamsters' demands at their respective line group meetings. IDF 232. Ultimately, the dealers concluded that the only way both to avoid unionization and to achieve labor peace was to give in to the demand for uniform, year-round Saturday closings. IDF 238. The agreement to close was an effort to undercut the desire of salesmen to unionize to achieve their goals. IDF 241. The agreement effectively brought a halt to the organizational activities of the early 1970s. IDF 277. Though the Teamsters have attempted to organize dealerships since then, there apparently have not been any campaigns of the intensity seen before 1974. IDF 278.

Most Detroit-area dealers have experienced relative labor peace ever since they agreed to year-round Saturday closings in December 1973. IDF 242. Dealers who have tried to open on Saturdays or in the evening, however, have been subjected to picketing, threatening telephone calls, serious damage to their inventory, and vandalism of their lots and showrooms. IDF 245-276. Salesmen were among the picketers, *e.g.*, IDF 247, 248, 259, but the perpetrators of the threats and vandalism remain unidentified.

II. NONSTATUTORY LABOR EXEMPTION

Respondents contend, and the ALJ found, that the various agreements to cut back dealer showroom hours directly

[5]*See* n. 1, *supra*.

responded to the demands of sales employees for uniform, shorter work hours. For example, DADA began discussing Wednesday and Saturday evening closings the same month the Teamsters' 1959 organizational campaign got underway. The movement to close Friday evenings started the month after line groups proposed "minimum employment standards" to head off unionization in 1960. Tuesday evening closings surfaced in DADA's discussions just two weeks after the ASA was formally incorporated in 1966. The agreement to close on Saturdays during the summer was reached after two years of violent strikes against dealerships, and the extension of Saturday closings to the rest of the year followed another round of strikes in 1971 and 1972.[6]

The ALJ ruled that the respondents' agreement to limit showroom hours falls within the "nonstatutory labor exemption" to the antitrust laws. The nonstatutory labor exemption is a judicially-created exemption that protects certain concerted activity from antitrust scrutiny. The ALJ based his ruling on his conclusions that the agreement "[grew] out of a labor dispute"; that it was "motivated primarily by labor concerns and had a more direct impact on competition over hours and working conditions than on business competition"; and that "any injury to competition or consumers . . . was outweighed by the benefits of labor peace." IDC 2, 4, 5. Complaint counsel contend that the ALJ's decision stretches the nonstatutory labor exemption beyond its recognized limits. We agree.

The nonstatutory labor exemption "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."

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[6]The parties do not suggest that we treat the various agreements to reduce hours separately for purposes of antitrust analysis, and we see no reason to do so. Accordingly, in the remainder of this opinion we refer to the respondents' "agreement" to limit showroom hours in the singular.

Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 622 (1975). The nonstatutory exemption is an adjunct to the statutory exemption for labor activities found in Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 and 29 U.S.C. § 52, and in the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115. Those statutes declare that labor organizations are not illegal combinations or conspiracies in restraint of trade under the antitrust laws and limit the power of courts to issue injunctions in cases involving or growing out of a labor dispute.

The statutory exemption for labor activity reflects Congress' desire to accommodate the antitrust laws to labor policy. The statutory exemption, however, is limited to legitimate organizing efforts and other collective activities undertaken by employees without participation by nonlabor parties. It does not apply to concerted action or agreements between labor and non-labor parties, such as a collective bargaining agreement between a union and an employer. *Connell*, 421 U.S. at 622; *United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965); *Mackey v. National Football League*, 543 F.2d 606, 611 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801 (1977).

The Supreme Court, though, has found that a proper accommodation of labor and antitrust policies requires some agreements between labor and non-labor parties to be free from antitrust sanctions. *Connell*, 421 U.S. at 622, *citing Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Co.*, 381 U.S. 676 (1965). The Court saw that the goals of federal labor law would never be achieved if standardization of wages, hours, and working conditions—which ultimately will affect price competition among employers—were held to violate the antitrust laws. *Id.* Accordingly, the Court has recognized a "nonstatutory"

exemption for labor-management agreements and certain other forms of conduct involving non-labor parties.

The central purpose of the nonstatutory labor exemption is readily apparent from the language the Supreme Court has used in describing the policy conflict to which the exemption responds. In *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945), the Court identified "two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining." *Id.* at 806. Similarly, in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Court stated that its concern was to "harmoniz[e] the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting 'the peaceful settlement of industrial disputes by subjecting labor- management controversies to the mediatory influence of negotiation.' " *Id.* at 665, *quoting Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1964). In *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965), the Court noted that "employers and unions are required to bargain about wages, hours and working conditions" and found that that requirement "weighs heavily in favor of antitrust exemption for agreements on these subjects." *Id.* at 689. And in *Connell*, 421 U.S. 616, the Court's most recent discussion of the nonstatutory exemption, the Court stated that the exemption results from the need for "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets." *Id.* at 622.

As these cases amply demonstrate, the focus of the nonstatutory labor exemption is collective bargain-

ing.[7] The Court's language reveals its sensitivity to Congress' desire that employers and employees jointly determine wages, hours and working conditions by negotiating with each other in good faith. The exemption is a recognition that the negotiation process would be undermined if the antitrust laws could be used to frustrate the product of the negotiations.

To say that collective bargaining is at the heart of the exemption, however, is not to say that the exemption applies only to collective bargaining agreements. *Connell*, for example, demonstrates that the availability of the exemption does not turn on whether the challenged restraint is part of a formal labor contract. The Court in that case reviewed an agreement between a building contractor and a union in which the building contractor promised to hire only subcontractors that had signed a collective bargaining agreement with the union. The union neither represented nor had any intention of representing the builder's own employees. The Court denied the exemption, but there is no suggestion that it did so merely because the subcontracting agreement was not part of a collective bargaining agreement between the builder and the union. On the contrary, as noted by the Ninth Circuit in an opinion by Judge (now Justice) Kennedy, the *Connell* Court undertook an extensive analysis of the competitive effects of the subcontracting agreement—an analysis that would have been unnecessary if the exemption were limited to restraints imposed by collective bargaining agreements. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905-906 (9th Cir.1987); *accord, Zimmerman v. National Football League*, 632 F.Supp. 398, 404 (D.D.C.1986).

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[7]The lower courts have echoed the language of the Supreme Court. *E.g., Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977) ("the basis of the nonstatutory exemption is the national policy favoring collective bargaining"); *Zimmerman v. National Football League*, 632 F. Supp. 398, 403 (D.D.C. 1986) ("the exemption reflects a national policy encouraging collective bargaining over wages and working conditions").

On the other hand, the cases also demonstrate that concerted conduct does not automatically qualify for the exemption simply because it is motivated by labor concerns. *Connell* again is an appropriate example. There the Court denied the exemption even though the agreement between the contractor and the union was clearly motivated by labor concerns—the union's desire to organize subcontractors (and, presumably, the contractor's desire to avoid picketing and other disruptions of its business by the union). The Court said:

> This record contains no evidence that the union's goal was anything other than organizing as many subcontractors as possible. This goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from non-union firms. But the methods the union chose are not immune from antitrust sanction simply because the goal is legal.

421 U.S. at 625. In *United Mine Workers v. Pennington*, 381 U.S. at 664-65, the Court stated that not even a negotiated agreement on a mandatory subject of bargaining is automatically exempt from antitrust scrutiny if it seeks to prescribe labor standards outside the bargaining unit. Thus, motivation by labor concerns is only a necessary and not a sufficient condition for application of the nonstatutory exemption.

Applying the principles from the preceding two paragraphs, we cannot automatically deny respondents the nonstatutory exemption on the ground that their showroom hours agreement is not a collective bargaining agreement, nor can we automatically grant the exemption because the agreement is alleged to have been spurred by labor concerns. Unfortunately, these principles take us no farther in the analysis.

The parties offer alternative approaches for determining whether a particular agreement is entitled to the nonstatutory

labor exemption. Complaint counsel argue that the exemption is warranted in only three situations, "all of which involve the collective bargaining process," CAB at 38: (1) where there is an actual agreement between labor and non-labor parties; (2) where non-labor parties have collaborated in preparation for collective bargaining; and (3) where non-labor parties have engaged in concerted offensive or defensive tactics during the course of the collective bargaining process. *Id.* at 38-39. Respondents, on the other hand, urge us to hold that concerted action is exempt whenever it "results from a dispute over labor concerns, and affects primarily those concerns." RAB at 21.

Rather than endorsing either of the approaches advanced by the parties, we rely on general principles derived from the case law. The vast majority of nonstatutory labor exemption cases involve some sort of concerted activity or agreement between a union and an employer—usually, but not always, a collective bargaining agreement. Few of the cases cited to us, and none decided by the Supreme Court, address what we are faced with here: an agreement involving only employers. Nevertheless, those few cases clearly show that the nonstatutory labor exemption protects employer agreements only when those agreements are part of the give-and-take of a negotiation process.[8]

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[8]The few employer-agreement cases all involved formal collective bargaining situations in which impasse had been reached before the employers took joint action. *E.g. Amalgamated Meat Cutters & Butchers Workmen of North America, Local Union No. 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979) (food wholesaler agreed to loan employees to grocery store to replace striking employees; court held agreement was not unlawful because store's purpose in using Wetterau's employees was to keep its business in operation and thereby to enhance its bargaining power); *Newspaper Drivers & Handlers' Local No. 372 v. NLRB*, 404 F.2d 1159 (6th Cir. 1968), *cert. denied*, 395 U.S. 923 (1969) (*Detroit News* locked out its employees in support of the *Detroit Free Press;* in *dicta*

Respondents' agreement on showroom hours was not part of a labor negotiation process. On the contrary, respondents admit that, to the extent the agreement was motivated by labor concerns, it was designed to *prevent* collective bargaining. Immunizing respondents' concerted activity from the antitrust laws therefore would not serve the congressional policy of encouraging employers and employees to work out their differences through arm's-length, good faith bargaining.

Both parties also cite *Mackey v. National Football League*, 543 F.2d 606 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801 (1977), as a test for the applicability of the nonstatutory exemption. In *Mackey*, the Eighth Circuit reviewed Supreme Court precedent and concluded that the exemption is available only when (1) the restraint of trade "primarily affects only the parties to a collective bargaining relationship"; (2) the agreement concerns a mandatory subject of collective bargaining; and (3) the agreement is the product of bona fide, arm's length bargaining. *Id.* at 614. As we have already observed, the respondents' hours restriction was not established through bona fide, arm's-length bargaining between dealers and employees. Thus, the third part of the *Mackey* test is fatal to the respondents' nonstatutory exemption defense.[9]

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court reasoned that because the *News* was negotiating with same local over many of the same issues as the *Free Press*, the *News* was acting in its own legitimate bargaining interest in collaborating with competitor); *Plumbers & Steamfitters Local 598 v. Morris*, 511 F.Supp. 1298 (E.D. Wash. 1981) (lockout agreement; in *dicta*, court stated that employers were entitled to the nonstatutory exemption because complaint alleged that lockout was intended to force concessions from the union and agreement furthered "legitimate employer interests in collective bargaining").

[9]Because the third part of the *Mackey* test is not satisfied, we need not consider for purposes of applying the test whether the hours restriction "primarily affects" only the dealers and their employees or whether hours of operation would be a mandatory subject of bargaining.

Respondents assert that the nonstatutory exemption should apply as long as they were responding to the demands of their employees in establishing shorter hours. But it appears that satisfying labor demands was not the respondents' sole motivation; as discussed below in Section III, dealers clearly recognized economic advantages in agreeing to reduce hours. In any event, as the Supreme Court indicated in *Connell* and *Pennington*, motivation by labor concerns is not sufficient by itself to invoke the exemption. To hold otherwise would open up the exemption to abuse, not to mention difficulties of application in cases where the evidence of competitors' motivation is conflicting, incomplete, or subject to multiple interpretations. Employers would be able to band together to establish any number of anticompetitive restraints under the aegis of responding to labor demands.

The mere fact that sales employees benefit from the hours restraint also cannot justify granting an exemption. It is not surprising that employees would favor the agreement, since they have the same incentive to reduce competition as the dealers.[10] But if an exemption were held to apply to any agreement or concerted activity that "benefits labor," like one held to cover any agreement "motivated by labor concerns," it would be an exemption that swallows the rule. Taken to its logical conclusion, such an exemption would permit employers to fix prices in order to satisfy employee demands for higher wages—a proposition the Supreme Court has soundly rejected. *See Allen Bradley Co.*, 325 U.S. 797.

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[10]The incentive may be especially strong in a case where, as here, sales employees work on commission. The effect of losing a sale to a competing business (in this case, a dealership that keeps longer hours) or to another salesperson at the same business (if extended hours permit customers to return when the original salesperson is off duty) is probably more obvious to an employee whose income is tied to individual transactions than to one who works on salary.

Respondents contend that *Jewel Tea*, 381 U.S. 676, compels the conclusion that the nonstatutory exemption applies in this case. In *Jewel Tea*, unions representing virtually all of the butchers in the Chicago area negotiated a collective bargaining agreement with the representatives of 9,000 meat retailers. Among other things, the agreement forbade the sale of meat outside the hours of 9:00 a.m. to 6:00 p.m. Jewel, a grocery store chain that wanted to operate self-service counters in the evening, filed suit under the Sherman Act to invalidate the marketing hours provision. The Supreme Court framed the issue as "whether the marketing-hours restriction . . . is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's length bargaining in pursuit of their own labor policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act." *Id.* at 689-90.

The Court found that the dispute between Jewel and the unions boiled down to a narrow factual question: whether night operations were possible without affecting butchers' workloads. *Id.* at 694. The Court stated that if it were true that self-service markets could actually operate without infringement of butchers' interests, Jewel's antitrust claim would have "considerable merit." *Id.* at 692. The defendant unions, however, had convinced the trial court that night operations would be impossible without affecting butchers. The Court, saying that its function was "limited to reviewing the record to satisfy ourselves that the trial judge's findings are not clearly erroneous," *id.* at 694, found sufficient support for the lower court's conclusions and therefore held that the marketing hours provision was exempt from Sherman Act scrutiny. *Id.* at 697.

To be sure, *Jewel Tea* and the present case have superficial similarities: both involve a restriction on marketing hours and

efforts by labor unions to obtain shorter working hours. But in *Jewel Tea*, unlike the case before us, the agreement was one to which both employees and employers were parties. Moreover, there was no question in *Jewel Tea* that the restrictive agreement had been reached through bona fide, arm's-length bargaining. Indeed, the Supreme Court assumed the existence of bona fide negotiations in framing the issue to be resolved. *Jewel Tea*, then, does not tell us how the Court would view an agreement to restrict hours of operation involving only employers, reached without arm's-length negotiations with employees.

This would be a much simpler case if, as in *Jewel Tea*, the agreement to limit showroom hours were contained in a formal collective bargaining agreement executed after direct negotiations. Respondents mischaracterize the foregoing observation as mere preference for one method of resolving a labor dispute (unionization and collective bargaining) over another (making concessions to avoid unionization). The distinction is not one of mere preference, however. As discussed above, the nonstatutory labor exemption protects labor-related agreements not because the content of such agreements is always "good," but because striking down the agreements would undermine the integrity of the collective bargaining process. Employers and employees would have little incentive to negotiate an agreement in good faith if they knew that the other party—or even a stranger to the negotiations—could overturn the agreement on antitrust grounds. Conversely, if no negotiations have taken place or are expected to take place, the integrity of the negotiating process cannot be threatened by application of the antitrust laws. Thus, the means of reaching the agreement under review are critical in determining whether the exemption applies.

The ALJ cited *Jewel Tea* in accepting the respondents' proposition that concerted activity is entitled to the nonstatutory

exemption whenever it is motivated by labor concerns and it primarily affects those concerns. ID at 44. We find no such holding in *Jewel Tea*. That case holds only that a marketing hours restriction may be exempt when it is "intimately related to wages, hours and working conditions" and when it has been established through "bona fide, arm's length bargaining." 381 U.S. at 689-90. The respondents have produced no other authority for their position, and we find none. We therefore hold that the ALJ erred in adopting respondents' test for the applicability of the exemption.[11]

Respondents next argue that, even if the exemption is limited to the collective bargaining process, the exemption should apply here. Respondents assert that the sales employees used a number of tactics, including the threat of unionization, to achieve shorter hours, and that "the sum total of these activities constituted the collective bargaining process." RAB at 28. The ALJ apparently was persuaded by this argument, *see* ID at 53-54, but we reject it.[12] The ALJ relied in part on the collective bargaining agreements signed by some individual dealerships. *See, e.g.*, IDF 229-231, 243, 288-299. These agreements, however, did not establish *bargained-for*

[11]Although the ALJ is correct that "the labor laws protect not just the negotiation of collective bargaining agreements between the employer and the union, but the full relationship among employees and employers," ID at 52-53, that does not mean that the nonstatutory labor exemption protects everything the labor laws do. It would be simple enough for the Supreme Court to hold that the antitrust laws must give way whenever "labor concerns" or "labor policy" is implicated, but we see no indication that it has done so. On the contrary, it appears that the court has taken pains to limit the scope of the exemption. The court's stated goal, after all, is to *accommodate* antitrust and labor policies.

[12]We agree with the ALJ's conclusion that the decision not to form a multi-employer bargaining unit is not fatal to respondents' nonstatutory labor exemption defense. *See, e.g., Newspaper Drivers & Handlers*, 404 F.2d 1159; *Plumbers & Steamfitters*, 511 F. Supp. 1298; *Wetterau Foods*, 597 F.2d 133. That conclusion, however, does not release respondents from having to show that their agreement arose in the context of bona fide, arm's length negotiations with employees.

showroom hours. The agreements merely incorporated, by means of maintenance of standards provisions, the pre-existing hours reductions orchestrated by DADA. Thus, those agreements did not memorialize hours limitations negotiated between dealers and employees; they simply perpetuated the results of earlier collusion. *See Zimmerman v. NFL*, 632 F.Supp. at 405 (discussing "the requirement of a bargained for, as opposed to a unilaterally imposed, condition"). In any event, very few dealers signed such agreements.[13]

Moreover, even if the agreements signed by individual dealerships had contained bargained-for hours restrictions, those agreements are not the ones before us in this case. The agreement before us is the agreement among dealers to establish *uniform* showroom hours. As complaint counsel point out, this agreement is completely separate from whatever negotiations may have gone on at individual dealerships. Thus, it would be improper to impute to the respondents' agreement any protection the nonstatutory exemption may offer individual dealer-employee negotiations.

Respondents have not pointed to any evidence that the agreement among the *dealers* resulted from activity that could fairly be characterized as arm's-length negotiation with their sales employees.[14] On the contrary, the evidence shows that the dealers adopted the hours limitation in order to *avoid* arm's-

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[13]The Initial Decision summarizes the hours provisions of contracts signed by seven dealers. IDF 288-299. All but one were maintenance of standards provisions. It is difficult to see how the remaining contract, a 1970 agreement between the ASA and Crestwood Dodge, could by itself support an argument that the market-wide restriction orchestrated by DADA arose in a collective bargaining context.

[14]We accordingly reject the ALJ's conclusion that respondents acted "in concert with sales employees and their union representatives" in adopting and adhering to the hours restraint. IDC 1.

length negotiation. As we have already stated, it would be inconsistent with the policy underlying the exemption to immunize concerted acts by employers that are intended to undermine the association of employees and to head off collective bargaining.

In short, none of respondents' arguments persuade us that the hours restraint is entitled to protection by the nonstatutory labor exemption. Our conclusion is consistent with the clear purpose of the exemption: to preserve the integrity of the negotiation process. The relevant question, given that purpose, is whether application of the antitrust laws to the agreement in question would somehow undermine past negotiations between employers and employees or reduce the incentives for them to negotiate with each other in the future. In this case, application of the antitrust laws would not have these effects. Respondents here agreed among themselves, not with their employees. Thus, finding that the agreement is an unlawful restraint of trade would not upset any careful balance of interests negotiated between employers and employees. Nor would it affect expectations that a settlement negotiated in the future—whether through formal, multi-employer collective bargaining or arm's-length talks at individual dealerships—would be protected from antitrust sanctions. For these reasons, we hold that the nonstatutory labor exemption does not apply to the respondents' agreement.

III. RESTRAINT OF TRADE ANALYSIS

Having concluded that the respondents' concerted activity is not immune from antitrust scrutiny, we turn to the question of whether that activity constitutes an unlawful restraint of trade.[15] At the outset, we are faced with selecting the

[15]Restraints of trade that violate Section 1 of the Sherman Act, 15 U.S.C. 1, are "unfair methods of competition" under Section 5 of the FTC Act. *FTC v. Cement Institute*, 333 U.S. 683, 694 (1948).

appropriate method of analyzing the respondents' agreement. The case law is not especially helpful in this regard.[16] We note, however, that in a fairly recent case involving a restriction on business hours, the court used a per se analysis in finding a violation of the Sherman Act. *State of Tennessee ex rel. Leech v. Highland Memorial Cemetery, Inc.*, 489 F.Supp. 65 (E.D.Tenn.1980).

The parties have engaged in the usual debate over whether to apply the *per se* rule or the rule of reason, but as we recently said in *Massachusetts Board of Registration in Optometry*, Docket No. 9195, slip op. at 10 (F.T.C. June 13, 1988), the utility of that approach has been called into question by the Supreme Court's recent pronouncements on horizontal restraints. In *Mass. Board*, we reviewed the Court's decisions in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984), and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986). We observed that in all three of these cases, the Court avoided applying the *per se* label to a restraint that arguably fit within a traditional *per se* category. The Court then went on to consider, but without a full-blown market analysis, the procompetitive justifications offered for the restraint.

BMI, NCAA, and IFD, read together, suggest that the *per se* rule and the rule of reason are converging. Indeed, in *NCAA* the Court expressly stated that there is often no bright line separating *per se* from rule of reason analysis, and that the essential inquiry is the same under either rule: "whether or

[16]It appears that the only two Supreme Court cases involving a restriction on business hours are *Jewel Tea*, 381 U.S. 676, and *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). In *Jewel Tea*, the Court was not required to decide whether to apply the per se rule or the rule of reason because it held that the marketing hours restraint was immune from antitrust review. In *Chicago Board of Trade*, the restriction did not actually prohibit doing business outside the approved hours of operation, but only the price at which business could be transacted during those hours.

not the challenged restraint enhances competition." 468 U.S. at 104 and n. 26.[17] In *Mass. Board*, we concluded that the analysis undertaken in *BMI*, *NCAA*, and *IFD* boils down to the following three-step inquiry:

> First, we ask whether the restraint is "inherently suspect." In other words, is the practice the kind that appears likely, absent an efficiency justification, to "restrict competition and reduce output"? For example, horizontal price-fixing and market division are inherently suspect because they are likely to raise price by reducing output. If the restraint is not inherently suspect, then the traditional rule of reason, with attendant issues of market definition and power, must be employed. But if it is inherently suspect, we must pose a *second* question: Is there a plausible efficiency justification for the practice? That is, does the practice seem capable of creating or enhancing competition (*e.g.*, by reducing the costs of producing or marketing the product, creating a new product, or improving the operation of the market)? Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry. If it is not plausible, then the restraint can be quickly condemned. But if the efficiency justification is plausible, further inquiry—a *third inquiry*—is needed to determine whether the justification is really valid. If it is, it must be assessed under the full

[17]This statement is a departure from conventional wisdom, which teaches that the only inquiry under the *per se* rule is whether the restraint falls within a specific category (*e.g.*, "price fixing" or "customer allocation"). Once found to fall within one of these categories, the restraint is condemned without further inquiry. *See NCAA*, 468 U.S. at 103-04 ("*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct").

> balancing test of the rule of reason. But if the justification is, on examination, not valid, then the practice is unreasonable and unlawful under the rule of reason without further inquiry—there are no likely benefits to offset the threat to competition.

Slip op. at 12-13. By adopting this method of analysis, we focus on the economic realities and substantive concerns about competition that ultimately must govern our decisions.[18] We now apply the three-step inquiry to the respondents' showroom hours agreement.

We view the respondents' agreement to limit showroom hours as inherently suspect. Common sense alone suggests that the hours a business is open to serve customers is a form of output. A consumer may consider any number of factors in deciding where to shop, including price, selection, location, reputation, and service, but surely one of those factors is whether the business provides hours that are convenient to the consumer's schedule. If several competitors are identical in all respects except the business hours they offer, the consumer will choose which ones to patronize on the basis of that difference; the consumer is unlikely to remain indifferent.

We see no reason to believe that car dealers are less susceptible to this phenomenon than other retail businesses. Indeed, a car dealer, like other retailers, is not a manufacturer but rather a provider of sales and support services. Although units produced or sold may be a useful measure of a manufacturer's

[18]As we recognized in *Mass. Board*, slip op. at 12 n. 12, the Supreme Court has at times continued to follow a more traditional line in its opinions. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (Court held price-fixing agreements *per se* illegal and therefore refused to consider alleged procompetitive justifications); *Catalano, Inc. v. Target Sales, Inc.* 446 U.S. 643 (1980) (similar holding). Our method of analysis is consistent with the traditional approach and would not lead to different results in such cases.

output, the output of a car dealer is not obviously measured in such terms alone.

Dicta from the *Jewel Tea* case indicate that the Supreme Court also recognizes business hours as a form of output. Justice White's opinion announcing the judgment of the Court acknowledged that the agreement to restrict meat counter hours was an "obvious restraint on the product market" and that its effect on competition was "apparent and real." 381 U.S. at 692, 691. Justice Douglas, in dissent, pointed out that "[s]ome merchants relied chiefly on price competition to draw trade; others employed courtesy, quick service, and keeping their doors open long hours to meet the convenience of customers." *Id.* at 737. He further observed that immunizing the restriction under the nonstatutory labor exemption would mean that Jewel could not "use convenience of shopping hours as a means of competition." *Id.* at 736.

These common-sense impressions are solidly grounded in economic theory. We presume that consumers allocate their time in the manner they think is most efficient or beneficial to them. By completely eliminating certain shopping hours, the respondents' agreement forces consumers to shift their car shopping to hours they otherwise would not have chosen for that activity. The forced restructuring of their schedules raises the opportunity cost to consumers of car shopping. This increase in costs encourages consumers to spend less time comparing prices, features, and service, and thereby reduces pressure on dealers to provide the prices, features, and services consumers desire. And even if the amount of time spent shopping remains unchanged, the restriction reduces efficiency, since without it consumers could reorganize their activities in a way that would increase their overall satisfaction.

Moreover, there is no economic difference between an agreement to limit shopping hours and an agreement to in-

crease price. One commentator has illustrated this point with, appropriately, an example of automobile dealers agreeing to close on Sundays:

> Leisure and money are merely different forms of income for producers and different forms of payment by consumers. When they are obtained by agreed restrictions of output, there is no valid means of distinguishing between them. An example may make the point clear. It is, presumably, more likely that a judge in the Brandeis tradition would uphold an agreement by automobile dealers to close on Sundays than an agreement by the same dealers to add $200 to the price of each car. Yet there is no difference between the cases. Both are limitations upon competition whose sole purpose is to increase the dealers' income by restricting output. The output in one case is the number of cars sold (which will decrease with the raised price); the output in the other case is the provision of convenience of shopping to consumers (which will decrease with the Sunday closing). The identity is shown further by the ability of the dealers to switch the results of the two agreements. Auto dealers with Sundays off can work elsewhere on those days, converting leisure to money; and dealers with higher prices and profits can work fewer hours, converting money to leisure.
> . . .
>
> From the consumers' point of view such agreements are also indistinguishable. Consumers who lose the convenience of shopping on Sunday are deprived of something that is as much an economic good as is money. There is no acceptable way for a judge to decide that a restriction in the offering

> of a convenience is any less objectionable than a restriction in the number of automobiles sold.

Bork, *The Antitrust Paradox* 85-86 (1978).

Our view of the respondents' agreement finds support not only in common sense and economic theory, on both of which we may reasonably rely, *IFD*, 476 U.S. at 456, but also in the record. The evidence indicates that respondents expected the hours restriction to benefit them by limiting comparison shopping. For example, in a letter to a dealer, DADA's executive vice president explained the evening closing program as follows:

> Our association has worked on this evening closing project for several years, to a point where practically all new car dealers are closed three evenings a week. This situation has proven popular, not only with the dealership employees, but with the dealers themselves. They have found that they have been able to somewhat reduce their costs, and more importantly they have improved their grosses. This has been brought about by the fact that with fewer shopping hours, the public can devote less time to shopping, and consequently forcing down prices.

CX 171. In another letter urging a dealer to join the evening closing program, the executive vice president noted that "the line groups with 100% cooperation have found that this program minimizes shopping by prospective buyers." CX 166. Earlier, DADA had issued a bulletin stating that most dealers liked the program "because it improves employee morale, cuts down shopping, and contributes generally to a better buying climate." CX 140A.

That the dealers and associations were aware of the underlying competitive forces cannot be denied. In one of the letters

cited above, DADA's executive vice president admitted his "fear" that "some of the dealers who are now cooperating may decide to stay open if they see that a few others are doing so." CX 166. Comments in response to DADA's survey on Friday evening closings showed that this fear was well-founded. One dealership stated that it "definitely want[ed] to close on Friday nights," but that it was unable to do so "because Stark Hickey refuses to close. If Stark Hickey will close, we will close." CX 156B. Other dealer comments were similar.[19] What the comments signify is that competitive pressures prevented individual dealers from reducing hours unilaterally.

In another document, the Cadillac line group urged its members not to skirt the Saturday closings by making appointments or even being around the lot on that day.[20] The memo summed up the effect of the restriction as follows: "Every one closed on Saturday means no advantage to anyone and no disadvantage to anyone!" CX 101. The latter statement, in our view, neatly expresses what this case is all about—except, of course, for the resulting disadvantage to consumers.

Other factors in the record further persuade us that showroom hours are an important basis of competition. One

[19] *E.g.* comment of Dick Lurie Ford ("Other dealers in area are open Friday night"); comment of Dean Sellers, Inc. ("our brother Ford dealers are open on Friday evenings. This forces us to remain open. If these dealers will close Fridays, we will be glad to do so"); comment of Avis Ford ("Will close only if all are closed, not just a majority"); comment of North Bros. G.C. ("Major competitors open"); comment of Ed Schmid ("Would like to close *only* if nearby Ford dealers did"); comment of Krajenke Buick ("We have been closing and are still closing, but, have been giving some consideration to keeping open since Walker Buick Sales, Woody Pontiac, etc. are keeping open"). CX156B-C

[20] The memo noted that Saturday closing had begun as a method of discouraging unionization, but went on to say that dealers had experienced no drop in volume; in fact, according to the notice, "grosses actually went up." CX 101.

is the evidence that numerous dealers resisted the DADA evening closing program and that, since 1973, many have tried to open their showrooms on Saturday or on one of the prohibited evenings. *See* IDF 27-33, 246-276. Another is the finding, which respondents do not dispute, that Detroit is the only metropolitan area in the country in which almost all dealers are closed on Saturdays. See IDF 53-55.[21] The former factor suggests that some dealers in Detroit see a competitive advantage in keeping longer hours than their rivals, and the latter suggests that in cities where there is no agreement to keep showrooms closed, competitive forces lead dealers to keep them open.

The fact that overt coercion has been needed to prevent dealers from reopening is yet another indication that hours of operation are a form of competition among dealers. Since 1973, demonstrations and vandalism have thwarted attempts by individual dealerships to extend their hours. The ALJ cited over two dozen instances in the 1970s and 1980s in which a dealer has tried to open during one of the times covered by the agreement but eventually given up because of demonstrations, threats, and property damage. *See* IDF 246-276. The occurrence of these acts of intimidation supports an inference that dealers who kept longer hours presented a competitive threat to dealers who complied with the agreement. Sales employees from rival dealerships undoubtedly demonstrated against dealers who violated the agreement because they were afraid that their own employers would follow suit in extending hours. But rival dealers would follow suit only if they were

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[21]Respondents characterize the second factor as "irrelevant," RAB at 60, but in *Indiana Federation of Dentists* the Supreme Court thought it relevant that "there was evidence that outside of Indiana, in States where dentists had not collectively refused to submit x-rays, insurance companies found little difficulty in obtaining compliance by dentists with their requests." 476 U.S. at 456.

losing customers to the dealers who remained open—which in turn would indicate that showroom hours are a basis on which dealers compete for customers.

In short, common sense, economic theory, and the evidence convince us that showroom hours are an important form of output and a dimension in which new car dealers clearly compete. Thus, a horizontal agreement to limit showroom hours is one that "appears likely, without some efficiency justification, to 'restrict competition and reduce output.' " *Mass. Board*, slip op. at 12.

Accordingly, we turn to the second step of the inquiry: whether there are plausible efficiency justifications for the agreement. Although respondents offered three efficiency justifications in the proceeding below, none are discussed in their appeal brief. Respondents instead rely on *Buffalo Broadcasting Co., Inc. v. ASCAP*, 744 F.2d 917 (2d Cir.1984), *cert. denied*, 469 U.S. 1211 (1985), and *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366 (9th Cir.1983), for the proposition that procompetitive benefits need not be advanced if the restraint has not first been shown to have significant anticompetitive effects. RAB at 57. Whether or not that proposition is correct, respondents' reliance on it is misplaced. Here, as discussed at length above, complaint counsel have met their burden of showing that the restraint adversely affects competition.[22]

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[22]In the proceeding below, respondents offered as efficiency justifications (1) lower dealer overhead costs, (2) the ability to attract higher-quality sales personnel, and (3) the prevention of unionization. We agree with complaint counsel that none of these is plausible. First, a cost efficiency occurs only if the agreement enables the respondents to produce the same output at less cost, or more output at the same cost. In either case, cost *per unit of output* decreases. Here, unit costs did not decrease. Although dealer overhead may have been reduced, so was output (in this context,

Because no valid procompetitive justifications have been advanced in support of the restraint, we need not proceed to the third step of the *Mass. Board* analysis. We therefore hold that respondents' agreement is an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

Respondents argue that this holding is precluded by the ALJ's findings that prices of new cars in the Detroit area did not go up as a result of the respondents' concerted action.[23] We find this argument unpersuasive for several reasons. First, the Supreme Court rejected a similar argument in *Indiana*

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showroom hours). Thus, cost per unit of output (overhead per showroom hour) was unaffected by the agreement.

The second proposed efficiency is equally implausible. Although a shorter work week, like any other desirable working condition, might help dealers attract better employees, no explanation has been given why an *agreement* among dealers is necessary to bring this about. Any dealer who believes that reducing hours will attract better sales personnel can reduce hours unilaterally. In fact, it may be in that dealer's interest *not* to have an agreement, because it will be more difficult to attract the best candidates if other dealers are offering the same hours. The only thing that might prevent the dealer from acting unilaterally is the need to stay open longer to meet competition from other dealers. But respondents obviously may not rely on the argument that an agreement is necessary because otherwise competition would force them to keep longer hours. Such arguments have been characterized as "nothing less than a frontal assault on the basic policy of the Sherman Act." *IFD* 476 at 463, quoting National Society of Professional Engineers v. United States, 435 U.S. 679, 695 (1978).

We also find no merit in the third proposed efficiency. Given the national policy favoring the association of employees to bargain in good faith with employers over wages, hours and working conditions, we do not believe that preventing unionization can be a legitimate justification for an otherwise unlawful restraint.

[23]Specifically, the ALJ found no evidence that the Saturday closing caused an increase in retail prices of cars in the Detroit area, or that the hours reductions increased car dealers' gross margins on sales. IDF 300, 301.

Federation of Dentists. In that case, the dentists contended that withholding x-rays could not be held an unreasonable restraint of trade absent a finding that the practice resulted in more costly dental services for consumers. The Court, however, held that an agreement to withhold information used to determine whether purchases were cost-justified was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices ... than would occur in its absence." 476 U.S. at 461-62. We think an agreement that limits consumers' ability to comparison shop is also likely enough to disrupt the market's price-setting mechanism so as not to require further proof. And even if further proof were required, we agree with complaint counsel that the relevant indicator is not, as the ALJ thought, whether prices increased in absolute terms, but rather whether prices were above competitive levels.[24]

In any event, the parties' focus on retail prices misses the point in this case. As noted above, even if out-of-pocket expenses are not increased, consumers pay higher prices as a result of the hours restriction in the form of reduced convenience and service. The income transferred from consumers to dealers is in the form of leisure time, not monetary profits. These losses are not pecuniary, but they are no less real or

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[24]The ALJ made no findings on whether prices are above competitive levels. We observe, however, that prices may efffectively have risen above competitive levels if they simply remained the same after the agreement. Holding all other factors constant, we would expect car prices to have gone down in response to dealers' lower overhead costs. If this did not occur, the consumers got less output (*i.e.*, fewer shopping hours) for the same amount of money after the agreement was implemented. This is no different from increasing the price of a stick of chewing gum by keeping the package price the same but putting fewer sticks in the package.

harmful to consumers than higher prices for goods and services. Bork, *supra*, at 86.[25]

Respondents also contend that market conditions allegedly unique to the Detroit metropolitan area result in consumers having little need or desire to shop for new cars on Tuesday, Wednesday, or Friday evenings or on Saturdays.[26] As a result, respondents argue, comparison shopping is not inhibited by the hours limitation. We find this argument equally unpersuasive. Even if longer showroom hours would in fact be completely useless to Detroit consumers, the respondents are not

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[25]Complaint counsel and respondents both presented extensive expert testimony on the hours restriction's impact on prices, and the parties spend a good portion of their briefs criticizing each other's experts. We find the expert testimony inconclusive. We believe, however, that our analysis of the market forces underlying dealer showroom hours is more than sufficient to support the conclusion that the hours limitation restricts output and harms consumers.

Although respondents characterize any anticompetitive effects as "abstract or theoretical," RAB at 54, it is only the amount of harm, not its existence, that is "abstract." The likelihood that a judge would have difficulty computing damages in a successful action by a private plaintiff does not by itself demonstrate that harm to consumers is only "theoretical." *See Highland Memorial Cemetery*, 489 F. Supp. at 68 (court agreed that injury to consumers was too small and speculative to award damages, but nevertheless held that restriction on business hours affected competition).

[26]Specifically, respondents point out that auto workers and other industrial workers in Detroit are shift workers who often get off work in the morning or early afternoon and thus can shop for cars on weekdays. They further point to the "high percentage" of Detroit-area families who have members working for car companies and who therefore qualify for employee purchase plans under which the price of the car is predetermined. Respondents also cite evidence that Saturday sales were declining in the 1960s and that dealers who have opened on Saturdays in recent years have done little business. Of course, if business declined, it may have as much to do with customers being subject to intimidation and harassment at dealerships as with their purported lack of desire for extended hours.

justified in making that judgment on behalf of their customers. *IFD*, 476 U.S. at 462. Presumably, if longer hours are uneconomic, the market itself would soon lead dealers to shorten their hours of operation. *id.*

In IFD, the Court stated that "a refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." 476 U.S. at 459. We think showroom hours are at least as much a part of the "package of services" car dealers offer their customers as the forwarding of x-rays is of the "package of services" dentists offer their patients. Moreover, it is clear from the record that without the agreed-upon limitation, showroom hours would have been determined by the "ordinary give and take of the market place." *Id.*, quoting *National Society of Professional Engineers*, 435 U.S. at 692. We hold that, absent some procompetitive efficiency justification, such an agreement cannot be squared with the antitrust laws. *See Id.*

IV. OTHER DEFENSES

Respondents raised a number of other defenses in the proceeding below. These included the statutory labor exemption, coercion by the sales employees, evidence that certain respondents negotiated collective bargaining agreements restricting hours of operation, violation of due process caused by inordinate delay in issuing the complaint, an exemption implied from the Economic Stabilization Act of 1970, and the absence of evidence connecting certain respondents to the alleged concerted action. The ALJ dismissed the complaint on the basis of the nonstatutory labor exemption and therefore did not rule on these other defenses. We have authority under

§ 3.54 of our Rules of Practice to decide these issues without remand. Because they were adequately briefed in the parties' post-trial submissions to the ALJ, we proceed to rule on them.[27]

Respondents first contend that their joint conduct in closing showrooms is protected by Section 20 of the Clayton Act, 29 U.S.C. § 52. The notion that that section applies to joint conduct by employers, however, is inconsistent with the Supreme Court's interpretation of the statutory labor exemption. In *Connell*, 421 U.S. at 621-22, and *Pennington*, 381 U.S. at 662, the Court explicitly held that neither the Clayton Act nor the Norris-LaGuardia Act exempts concerted action or agreements between unions and nonlabor parties. Clearly, if bilateral agreements between employers and employees are not within the scope of the statutory exemption, agreements involving only employers, such as the one we have in this case, are not within its scope. Such concerted employer conduct is protected, if at all, by the nonstatutory exemption.

Respondents cite a number of cases for the proposition that the statutory exemption is applicable to employers. None of them is persuasive. Two of the cases, *Kennedy v. Long Island Railroad Company*, 319 F.2d 366 (2d Cir.), *cert. denied*, 375 U.S. 830 (1963), and *Clune v. Publishers Association of New York City*, 214 F.Supp. 520 (S.D.N.Y.), *aff'd*, 314 F.2d 343 (2d Cir.1963), were decided before *Pennington* and *Connell*. In another, *Richards v. Neilsen Freight Lines*, 602 F.Supp. 1224 (E.D.Cal.1985), *aff'd*, 810 F.2d 898 (9th Cir.1987), the District Court held the statutory exemption applicable to an alleged union- employer conspiracy, not to concerted employer conduct. On appeal, the Ninth Circuit expressly declined to

[27]We need not address the collective bargaining agreements signed by individual dealerships since we have already discussed that defense in connection with the nonstatutory exemption.

rule on the statutory exemption question, finding that the nonstatutory exemption was applicable. 810 F.2d at 904.

Mid-America Regional Bargaining Association v. Will County Carpenters District Council, 675 F.2d 881 (7th Cir.), *cert. denied*, 459 U.S. 860 (1982), also involved an alleged union-employer agreement. The court's discussion focused on whether the agreement amounted to a conspiracy that, under *Pennington* and *Allen Bradley Co.*, 325 U.S. 797, would take the agreement outside the scope of the statutory exemption. The court held that the plaintiffs had failed to plead an *Allen Bradley*-style conspiracy. Thus, the union's conduct was entitled to protection by the statutory exemption. Because it would have been anomalous to hold that the agreement was exempt but that one of the parties nevertheless violated the antitrust laws by participating in it, the court also granted protection to the employers—but protection that was derivative of the union's.

In the last case cited by respondents, *Plumbers & Steamfitters Local 598* v. Morris, 511 F.Supp. 1298 (E.D.Wash.1981), the court dismissed the complaint for failure to state an antitrust claim. Nevertheless, the court went on to state in dicta that the defendants, who had agreed to lock out employees following an impasse in collective bargaining, would have been entitled to both the nonstatutory and the statutory labor exemptions. We agree that the nonstatutory exemption would have been applicable, but we reject the court's view that the statutory exemption may apply to concerted conduct in which employees do not participate. As noted above, that view is inconsistent with the Supreme Court's understanding of the statutory exemption.

Respondents' remaining arguments can be dealt with summarily. First, they contend that they should be absolved of antitrust liability because dealers were coerced into joining the

agreement to restrict showroom hours. The record plainly shows, however, that the hours reductions began with DADA's evening closing "program," which DADA actively promoted and most dealers willingly agreed to follow. The record also shows that the coercion on which respondents rely generally took place at dealerships that were attempting to reopen after they had already conformed to the joint closings. We do not think respondents may excuse their decision to participate in the scheme by arguing that they later had to be forced to remain in compliance.

We also reject respondents' contention that they have been denied due process as a result of the length of time between the events challenged in the complaint and its issuance by the Commission. It is well settled that in order to show a denial of due process, respondents must demonstrate that they have been substantially prejudiced. *See, e.g., Arthur Murray Studio of Washington, Inc. v. FTC*, 458 F.2d 622, 624 (5th Cir.1972). The voluminous record in this case refutes any claim that respondents were not able to defend adequately against the Commission's charges; respondents called sixty witnesses and introduced approximately 2,400 documents. Nor have respondents shown any bad faith or misconduct by the government in causing the delay. Thus, this is not a case in which prejudice may be presumed. *See United States v. Naftalin*, 534 F.2d 770, 773-74 (8th Cir.), *cert. denied*, 429 U.S. 827 (1976) ("where the government is not engaging in intentional delay in order to gain a tactical advantage over the accused, the defendant must affirmatively demonstrate prejudice").

We next consider respondents' claim that antitrust immunity for their December 1973 agreement on year-round Saturday closings can be implied from the Economic Stabilization Act of 1970, as amended in 1973, and presidential directives promulgated thereunder. The 1973 amendments and presiden-

tial orders were concerned with energy conservation in the wake of the Arab oil embargo. Respondents apparently concede that neither the amendments themselves nor any orders or regulations issued under presidential authority expressly authorized competitors to agree upon hours of operation. Instead, they rely on two speeches by President Nixon in November 1973 in which he called upon businesses voluntarily to curtail working hours. RX 285, 287. We agree with complaint counsel that this request for voluntary, unilateral action by business concerns is insufficient to immunize respondents' joint conduct.[28] Moreover, even if an implied exemption were found to have existed at one time, we doubt that it survived the end of the "energy crisis."

Finally, five respondents contend that there is insufficient evidence to link them to the hours reduction agreement.[29] We have reviewed the evidence against the five respondents, and conclude that it is sufficient to connect them to the showroom hours agreement.[30]

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[28]Not only did President Nixon not call for agreements among competitors to limit hours, but Congress explicitly rejected a proposal that would have granted antitrust immunity for voluntary agreements among retail establishments to limit business hours. *See* H.R. 11450, 93d Cong., 1st Sess. § 114 (1973).

[29]The five are Al Dittrich, John Cueter, James Daniel Hayes, Gordon L. Steward, and Stewart Chevrolet, Inc.

[30]Al Dittrich's testimony indicated that his decision to close Crestwood Dodge on Saturdays was linked to the actions of other Dodge dealers. Tr. 3177 ("I was going to go with the rest of the troops. If they decided they were going to close, I was going to close, too. I wasn't going to be the Lone Ranger standing out there").

John Cueter was the operator, although not an owner, of Tel-Twelve Dodge in November 1973. He represented Tel-Twelve Dodge at the meeting of the Greater Detroit Dodge Dealers Association at which the members, including Tel-Twelve Dodge, decided to close Saturdays. *See* CX 3348, 3357.

James Daniel Hayes became executive president of DADA on January 1, 1975. IDF 2. In that capacity, Hayes has been fully aware of DADA's

V. SCOPE OF RELIEF

Because we reverse the dismissal of the complaint in this matter, we must determine what relief is appropriate to remedy respondents' violations of Section 5. The standard guiding us is whether the relief ordered is reasonably related to the unlawful conduct found. *See Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946). The following discussion tracks the provisions of the order proposed by complaint counsel in their appeal brief. We agree with most of what complaint counsel suggest, but we tailor the order in several ways to make it more workable.

Part I of complaint counsel's proposed order prohibits each respondent from entering into, continuing, or carrying out any agreement with "any other dealer" in the Detroit area to adopt or adhere to particular hours of operation. This provision simply commands the respondents to stop violating the law in the manner described in this opinion, and we therefore adopt it.[31]

Part II of complaint counsel's proposed order prohibits dealership and individual respondents from exchanging information or communicating with any other dealer in the Detroit area concerning hours of operation.[32] It also prohibits dealer-

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closing policy and, in fact, has explained the policy to others on DADA's behalf. *See, e.g.*, Tr. 4619.

Gordon L. Stewart opened Stewart Chevrolet for business in 1980. Although he claims to have decided unilaterally to continue the previous owner's hours of operations, he also was Secretary-Treasurer of the Chevrolet Dealers Association on March 9, 1983 when the Association's board of directors decided to maintain Saturday's closing. *See* CX 367, 389.

[31]Read literally, proposed Part I would forbid agreements only with dealer associations. Accordingly, in our final order we modify Part I to forbid each respondent from entering into any agreement with "any other respondent or other dealer or dealer association" in the Detroit area.

[32]After two years, respondents would be allowed to exchange information to the extent necessary to incorporate individual dealers' business hours into lawful joint advertisements.

ship and individual respondents from inducing or encouraging any other dealer in the Detroit area to adopt or adhere to particular hours of operation. Because it strikes at the means of forming an agreement to restrict hours, proposed Part II is reasonably related to the conduct found to violate the law in this case. We therefore adopt it.[33] We also adopt proposed Part III, which parallels Part II but applies to association respondents.[34]

Respondents object to Parts I, II, and III of complaint counsel's proposed order on the grounds that these provisions would prevent them from taking otherwise lawful actions in the context of labor disputes and negotiations with sales employees. Respondents argue that the likely result of a Commission decision to strike down the showroom hours limitation will be widespread unionization of dealerships. Under *Jewel Tea*, respondents continue, dealers could not then refuse to bargain over hours of operation. The order, they contend, will limit their ability to engage in such negotiations on a multiemployer basis.

We think respondents' concerns about Parts I, II, and III of the proposed order (Parts I and II of our final order) are unfounded. The order does not prohibit respondents from invoking the nonstatutory labor exemption in a proceeding by the Commission to enforce the order. Moreover, it is not clear that writing an explicit exemption for labor activities into the final order would serve any purpose. Because the applicability

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[33]As in Part I, in Part II of our final order we substitute the term "any other respondent or other dealer or dealer association" for the term "any other dealer."

[34]We consolidate Parts II and III of the proposed order by substituting "each respondent" in the introductory clause of Part II and deleting Part III. The consolidated provision is Part II of our final order. We also delete the proposed order's definitions of "other dealer" and "other dealer association" since those terms do not appear in our final order.

of the nonstatutory exemption is a factual determination, explicit language would give respondents no greater certainty—and a court no greater guidance—on whether particular conduct is exempt than an order without explicit language. Such a proviso certainly would not prevent the Commission from filing suit to enforce the order if it believed the exemption were being invoked improperly.[35]

Respondents' strongest objections are to Part IV of complaint counsel's proposed order. Part IV would mandate that each dealership and individual respondent be open for business on Saturday and on at least one weeknight other than Monday or Thursday for a period of not less than one year. Without such affirmative relief, complaint counsel argue, there is no realistic prospect of restoring showroom hours competition to the Detroit market. Dealers individually will decide to remain closed for fear of reprisals if they try to extend hours. Only if many dealers are open at the same time, making enforcement of the restriction difficult or impossible, will the fear of being singled out for enforcement be overcome.

Respondents strongest objections are to Part IV of complaint counsel's proposed order. Part IV would mandate that each dealership and individual respondent be open for business on Saturday and on at least one weeknight other than Monday or Thursday for a period of not less than one year. Without

[35]Respondents also urge us to delete the term "coercing" from Part II.B of the order, pointing out that allegations of violence and intimidation by respondents were dismissed at trial. We decline to take this action, for two reasons. First, it would be anomalous to issue an order prohibiting dealers from "requesting" or "recommending" that other dealers adopt certain hours but permitting them to "coerce" other dealers. Second, Part II prohibits dealers from encouraging any person to perform any of the acts barred by that section. Because the ALJ found evidence that sales employees have picketed dealers who opened on Saturday, and because sales employees are among the persons dealers might "encourage," use of the term "coercing" in Part II.B, is appropriate.

such affirmative relief, complaint counsel argue, there is no realistic prospect of restoring showroom hours competition to the Detroit market. Dealers individually will decide to remain closed for fear of reprisals if they try to extend hours. Only if many dealers are open at the same time, making enforcement of the restridtion difficult or impossible, will the fear of being singled out for enforcement be overcome.

We agree that a cease and desist order alone would be inadequate to remedy the respondents' violations of Section 5.[36] At the same time, we believe that an order requiring all dealers to be open certain hours may be inefficient and, in any event, is unduly restrictive. Accordingly, we have attempted in our final order to fashion a remedy that encourages competitive forces to operate.

Instead of declaring that all dealers shall be open on Saturday and an evening other than Monday or Thursday, we simply require dealers to maintain, for one year, a minimum of 64 hours of operation per week—leaving it to each dealer to decide how best to allocate those hours within the week.[37] Sixty-four hours is an appropriate figure given the evidence in the record of dealer hours in other Midwestern metropolitan areas. At trial, complaint counsel introduced surveys of dealer hours in Cincinnati, Cleveland, St. Louis, and Chicago. CX 3701-3704. On the basis of the surveys, we calculate average weekly hours in those cities to be 64.5, 60.0, 62.0, and 68.0 hours, respectively. The figure we have chosen to incorporate into our order falls squarely in the middle of that range.

As a practical matter, it seems likely that dealers will find it most profitable to provide the additional hours on Saturday,

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[36]*A fortiori*, we reject respondents' assertion that if the Commission issues an order in this matter, it should issue only a declaratory order.

[37]The affirmative hours requirement is Part III of our final order.

weekday evenings, or both. Individual dealers' competitive circumstances may vary, however. Our formulation, unlike complaint counsel's, gives dealers the flexibility to adjust their hours to take advantage of marketplace opportunities or to meet competition from their rivals. For example, a dealer could reallocate hours from Saturday to Wednesday evening if a competitor decided to remain open every Wednesday until midnight. Only the total number of hours is governed by the order. This has the advantage of restoring the benefits the market would provide consumers absent the respondents' restraint of trade—more convenient shopping and additional leisure time—without forcing dealers to remain open at specifically-mandated hours that may be less beneficial to them than other currently unused hours.

Any costs that may be imposed by the minimum hours provision will be minimized by the relatively short duration of the requirement and the discretion given dealers to reduce their sales force by as much as two-thirds during non-weekday hours.[38] After the provision expires, respondent dealers will be free to choose their own hours of operation, but they will have to do so in a competitive environment.

Neither are we troubled by the prospect that our order will override "maintenance of standards" provisions in agreements signed by a few individual dealerships to the extent that such provisions purport to limit showroom hours. As we have discussed at length above, the maintenance of standards provisions do not incorporate bargained-for hours, but instead perpetuate the respondents' unlawful concerted action. Thus, they should not be insulated from the Commission's remedial authority.

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[38] "Non-weekday hours" is defined in the order to mean hours other than 9:00 a.m. to 6:00 p.m. Monday through Friday.

Respondents strongly oppose any requirement that dealers extend their hours, invoking the Thirteenth Amendment's proscription of involuntary servitude, the common law rule against ordering specific performance of a contract for personal services, and the Norris-LaGuardia Act's prohibition on injunctive relief in cases arising out of a labor dispute. We find little merit in these arguments. The first two can be dismissed simply by noting that the order does not compel any particular sales or management employee to work during the extended hours.[39] Dealers can meet the requirement to maintain longer hours in any way they choose, such as by hiring more sales employees or by implementing split shifts. *See, e.g.*, CX 3705, 3706 (advertisements explaining that dealership that remained open on Saturdays despite respondents' agreement had arranged a work schedule satisfactory to its employees).

The assertion that the labor statutes prohibit the Commission from entering an order in this case fares no better. In effect, this assertion simply restates respondents' labor exemption arguments, to which we have already responded. Clearly, it would make no sense to say that respondents' conduct can be held, consistently with the labor statutes, to violate the antitrust laws, but that those statutes nevertheless preclude the Commission from remedying the violation. Moreover, our order is consistent with, not contrary to, the policy of the Norris-LaGuardia Act. The Act's purpose is to prevent courts from interfering with legitimate organizing and bargaining activities. *See generally United States v. Hutcheson*, 312 U.S. 219, 229-31 (1940). It would be ironic to hold that

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[39]Complaint counsel note that a few of the individual respondents are not affiliated with any respondent dealership, and that the proposed order might be interpreted as requiring these individuals personally to maintain weekly business hours. We have remedied that problem by adding language to the affirmative hours provision stating that the provision stating that the provision does not apply to individual respondents who neither own nor operate a dealership in the Detroit area.

the Act prevents us from striking down a restraint by which a group of employers sought to *avoid* unionization and bargaining.[40]

Respondents also argue that mandating extended hours is simply unwise. Pointing to the violence and vandalism that marred previous attempts to establish Saturday hours, respondents contend that the order will expose dealers and their families to threats, property damage, and the risk of physical injury. We do not minimize the seriousness of the acts of intimidation appearing in the record. However, we agree with complaint counsel that the order will make such coercive activity impractical and give dealers the safety of numbers. In any event, the Commission cannot allow itself to be cowed from ordering effective relief in this case. To do so would invite future investigative targets to police anticompetitive restraints with force in hopes that the Commission would shy away from striking down the restraint.

Part V of complaint counsel's proposed order is a corrective advertising requirement. The Commission has authority to order corrective advertising when it is necessary to dissipate future effects of a company's past wrongful conduct. *Warner-Lambert Co. v. FTC,* 562 F.2d 749, 756-61 (D.C.Cir.1977), *cert. denied,* 435 U.S. 950 (1978). We think corrective advertising is needed in this case. The record shows that virtually

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[40]Even if we were to assume for purposes of argument that Sections 4 and 5 of the Norris-LaGuardia Act apply to the Commission's order, the relief we enter would not be prohibited. Section 4 of the Act, 29 U.S.C. 104, provides that courts may not enjoin certain labor-related activities specified in that section. Section 5, 29 U.S.C. 105, precludes issuing an injunction on the basis that persons acting in concert with respect to the activities listed in Section 4 are engaged in unlawful combination or conspiracy. The conduct prohibited by our order does not fall within any of the categories of Section 4. In particular, we reject respondents' contention that ordering dealers to maintain longer hours is equivalent to order sales employees to cease refusing to work those hours.

all new car dealers in Detroit have been closed on Saturday and three weekday evenings since December 1973. After fifteen years of restricted showroom hours, consumers—especially the generation of car buyers that entered the market after 1973—are likely to have the continuing impression that dealerships are closed on Saturday and on Tuesday, Wednesday, and Friday evenings.[41] Accordingly, Part IV of our final order requires DADA to run a series of ads in the *Detroit News* and the *Detroit Free Press* devoted exclusively to explaining that dealers must offer expanded shopping hours for one year as a result of the Commission's order and that dealers may continue to offer expanded hours thereafter. In addition, Part V of the final order requires dealers to state their hours of operation—which will include the expanded hours required by Part III of the order—in any advertising they run for one year.

Part VI of complaint counsel's proposed order would require each respondent to report to the Commission any information it obtains concerning conduct prohibited by the order. This provision raises a number of difficult questions of interpretation and enforceability. We need not get to those questions, however, since we disagree with complaint counsel's rationale for including Part VI. Complaint counsel assert that this provision is necessary to detect future agreements on showroom hours. As respondents point out, though, the opening and closing of a dealership is essentially a public act. The Commission will easily enough be able to determine whether

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[41]The record supports that view. *E.g.*, CX 3805, Causley Tr. 66 ("I think in order to get the people back in the showrooms on Saturdays, so to speak, you would really have to do a lot of promotion"), CX 3809, Cook Tr. 48 ("I think people are just used to the fact that Mondays and Thursday nights are the shopping nights as far as automobile dealerships are concerned"); CX 3819, Genthe Tr. 46 ("The people are educated that we aren't open"); CX 3827, Kellel Tr. 66 ("They have now been cushioned [means conditioned, *see id.* at 67] over however many years, 10, 12, 15 years or however long it's been to know that you don't buy cars on Saturday").

dealers are maintaining uniform hours. If this phenomenon is observed, other provisions of the order, together with routine investigative tools, will give the Commission access to information showing whether an illegal agreement underlies the phenomenon. Moreover, should such an agreement be attempted, dealers who wish to remain open will have an incentive to report the violation to the Commission. Under the circumstances, we find that the rather significant burdens of proposed Part VI outweigh its benefits.

Part VII of complaint counsel's proposed order requires the association respondents to keep transcripts of all formal or informal meetings of their membership, committees, and board of directors for five years. In our view, this provision is reasonably related to the unlawful conduct found to have occurred in this case. The minutes of past association meetings provide direct evidence that those meetings were the principal forum for discussion of hours restrictions. *See, e.g.*, IDF 14-16, 22-28. The transcript requirement precludes the possibility that respondents could avoid detection of future discussions simply by sanitizing their association minutes.

We are not persuaded by respondents' argument that proposed Part VII (Part VI of our final order) would interfere with their right to discuss matters in confidence with legal counsel, who typically attend association meetings. Complaint counsel correctly point out that if the Commission were to request a transcript containing privileged information, respondents could simply submit a redacted version and explain their basis for withholding the deleted portions. Respondents do, however, raise a legitimate problem of interpretation with respect to proposed Part VII. They contend that the requirement to transcribe "informal" meetings may apply to association cocktail parties, golf outings, and dinners, or even to a conversation between two dealers on association premises.

Obviously, transcribing these kinds of encounters is impractical. We recognize that discussions about showroom hours could take place in these settings, but we think other parts of the order are sufficient to address that possibility. We therefore modify the transcript requirement to apply only to "business" meetings of association membership, boards, or committees.

Part VIII of complaint counsel's proposed order requires the association respondents to amend their bylaws to: (1) eliminate any provision inconsistent with the Commission's order; (2) prohibit members from discussing hours of operation at formal or informal meetings; and (3) require expulsion of any member who violates the prohibition on discussing hours of operation.[42] We find these requirements reasonably necessary to prevent further violations, especially since they address the "informal" meetings for which the transcript requirement is impractical. Moreover, there is Commission precedent for requiring an organization to prohibit actions taken by its members outside of the context of association activities and to expel members for violating the prohibitions. *E.g.*, *American Medical Association*, 94 F.T.C. 701, 1032, 1039 (1979), *aff'd*, 638 F.2d 443, 453 (2d Cir.1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982). Because DADA and the line associations were responsible for coordinating the evening and Saturday closing program, it is appropriate that they should now be responsible for policing the end of the program.

Respondents argue that proposed Part VIII (Part VII of our final order) amounts to censorship because it requires expulsion for merely discussing a forbidden subject. We find no merit in that argument. Discussion of hours of operation necessarily

[42]We have made the expulsion requirement somewhat more specific than proposed in complaint counsel's order.

precedes an agreement to restrict such hours, the conduct found illegal in this case. We have previously observed that speech which constitutes or relates to illegal conduct is not protected by the First Amendment. *Michigan State Medical Society*, 101 F.T.C. 191, 307 (1983). And the Ninth Circuit has held that "any remedy formulated by the FTC that is reasonably necessary to the prevention of future violations does not impinge upon constitutionally protected commercial speech." *Litton Industries, Inc. v. FTC*, 676 F.2d 364, 373 (9th Cir.1982).[43]

Part IX of complaint counsel's proposed order requires the association respondents to provide the Commission with the name and address of any member expelled for violating the

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[43]In *National Society of Professional Engineers*, 435 U.S. 679, the Supreme Court rejected the contention that a court order enjoining the Society from adopting any official opinion, policy statement, or guideline stating that competitive bidding is unethical abridged the Society's First Amendment rights. The court observed that the trial court was empowered to fashion appropriate restraints both to avoid a recurrence of the violation and to eliminate its consequences. The court stated:

> While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freeedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding. The First Amendment does not "make it . .. impossible ever to enforce laws against agreements in restraint of trade. . . . " *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502. In fashioning a remedy, the District Court may, of course consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

Id. at 697-98.

bylaws required by the order. Respondents contend that this provision is excessive in light of the other order provisions requiring that information be made available to the Commission. However, we have deleted proposed Part VI, one of the provisions to which they refer, and we find that proposed Part IX would enable the Commission to act quickly to prevent recurrences of the violation found in this case. Thus, we adopt Part IX, which becomes Part VIII of our final order.

Parts X, XI, and XII of complaint counsel's proposed order are boilerplate provisions requiring respondents to give a copy of the order to their employees, to file compliance reports, and to notify the Commission of changes of employment (for individuals) and corporate status (for dealerships and associations). Respondents object only to proposed Part X. They argue that distributing the order to employees in this case would intimidate employees in the exercise of their rights under the labor laws. We doubt Part X would have such an effect. The record shows that dealership employees over the years have been well-versed in their labor law rights. It is unlikely they would be misled into thinking the order regulates legitimate organizing or bargaining activities. Moreover, to the extent that some dealership employees may have participated in the violence and intimidation noted in the record, giving them knowledge that their employers are compelled by the Commission to expand hours may prevent reprisals against the employers. Accordingly, we adopt proposed Parts X, XI, and XII without change as Parts IX, X, and XI of our final order.

We believe the relief outlined above is necessary and appropriate to prohibit DADA and its members from agreeing or joining together to set hours of operation in the Detroit new car market. The order will benefit consumers by allowing market forces to determine the optimal amount and arrangement of showroom hours. Dealers will no longer be assured

that their competitors will not attempt to appeal to shoppers with more or different hours. Thus, dealers will be forced to consider consumer preferences in setting hours and to restore to consumers the convenience and service that were lost by virtue of the hours limitation.

VI. CONCLUSION

For the reasons stated above, we hold that respondents have unlawfully restrained trade, in violation of Section 5 of the Federal Trade Commission Act, by agreeing to keep Detroit area new car dealer showrooms closed on Saturday and on Tuesday, Wednesday and Friday evenings. We therefore reverse the ALJ's dismissal of the complaint and order the relief described in the previous section.

ISSUED: February 22, 1989

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to reverse the initial decision and enter the following order. Accordingly,

It is ordered, that for purposes of this Order, the following definitions shall apply:

1. "*Person*" means any natural person, corporation, partnership, association, joint venture, trust, or other organization or entity, but not governmental entities.

2. "*Dealer*" means any person who receives on consignment or purchases motor vehicles for sale or lease to the public, and any director, officer, employee, representative or agent of any such person.

3. "*Dealer association*" means any trade, civic, service, or social association whose membership is composed primarily of dealers.

4. "*Detroit area*" means the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State of Michigan.

5. "*Hours of operation*" means the times during which a dealer is open for business to sell or lease motor vehicles.

6. "*Weekday hours*" means the hours of 9:00 a.m. to 6:00 p.m. Monday through Friday.

7. "*Non-weekday hours*" means hours other than 9:00 a.m. to 6:00 p.m. Monday through Friday.

8. "*Dealership and Individual Respondent*" means any corporation listed in Addendum A to the order, including its officers, directors, representatives, agents, divisions, subsidiaries and successors and assigns, and any individual listed in Addendum B to the order.

9. "*Association Respondent*" means any association listed in Addendum C to the order, the officers, directors, representatives, agents, divisions, subsidiaries, successors and assigns of any listed association, and James Daniel Hayes.

10. "*Respondent*" means any dealership, individual, or association respondent.

I.

It is further ordered, That each respondent shall cease and desist from, directly or indirectly or through any corporate or other device, entering into, continuing, or carrying out any agreement, contract, combination, or conspiracy, in or affecting commerce (as "commerce" is defined in the Federal

Trade Commission Act), with any other respondent or other dealer or dealer association in the Detroit area to establish, fix, maintain, adopt, or adhere to any hours of operation.

II.

It is further ordered, That each respondent shall cease and desist from, directly or indirectly or through any corporate or other device, performing any of the following acts or practices or encouraging, inducing, or requiring any person to perform any of the following acts or practices, or entering into, continuing, or carrying out any agreement, contract, combination, or conspiracy with any other person in the Detroit area to do or perform any of the following acts or practices:

A. Exchanging information or communicating with any other respondent or other dealer or dealer association in the Detroit area concerning hours of operation, except to the extent necessary to comply with any order of the Federal Trade Commission, and except, after two (2) years from the date this order becomes final, to the extent necessary to incorporate individual dealers' hours of operation in lawful joint advertisements; or

B. Requesting, recommending, coercing, influencing, inducing, encouraging, or persuading, or attempting to request, recommend, coerce, influence, induce, encourage, or persuade, any other respondent or other dealer or dealer association in the Detroit area to maintain, adopt or adhere to any hours of operation.

III.

It is further ordered, That each dealership and individual respondent shall, commencing thirty (30) days after this order becomes final and continuing for a period of one (1) year, main-

tain a minimum of sixty-four (64) hours of operation per week for the sale and lease of motor vehicles. Each dealership and individual respondent shall post conspicuously its hours of operation at each of its places of business subject to this order in a manner and location readily visible to the public from outside the dealership's showroom. Each dealership and individual respondent shall conduct its sales operation during any non-weekday hours in all respects in the same manner as during weekday hours, except that the motor vehicle sales force on duty during non-weekday hours may equal in number no less than one-third of the motor vehicle sales force generally on duty during weekday hours.

The requirement of this Part III to maintain minimum weekly hours of operation shall not apply to any individual respondent who does not own or operate any dealership in the Detroit area.

IV.

It is further ordered, That respondent Detroit Auto Dealers Association, Inc. ("DADA") shall:

A. Beginning thirty (30) days after this order becomes final, and for a period of not less than four (4) weeks thereafter, place and cause to be disseminated each week at least four (4) advertisements, including one in the Thursday edition and one in the Saturday edition of the *Detroit News* and one in the Thursday edition and one in the Saturday edition of the *Detroit Free Press*. The advertisements shall be devoted exclusively to explaining that dealership and individual respondents are required to offer expanded shopping hours for one year as a result of this order and will be free to continue offering expanded hours thereafter. The advertisements shall be a minimum of one-eighth (1/8) of a page and shall be placed in

the same location at which advertisements for the sale of new automobiles ordinarily appear; and

B. Before placing the first such advertisement, DADA shall conduct, or cause to be conducted, copy testing of the advertisement. The copy testing shall be conducted by a reputable advertising or research organization using techniques commonly accepted in the advertising profession. The advertising or research organization shall provide a written report to DADA explaining the results of the copy testing. DADA may use the copy-tested advertisement to satisfy its obligations under this Part IV only if the report establishes that the advertisement effectively communicates: (1) that until [date of Order], most Detroit-area automobile dealers have not been open for business on Saturday or on Tuesday, Wednesday, or Friday evening; and (2) that as the result of litigation with the Federal Trade Commission, Detroit-area automobile dealers must offer expanded shopping hours for one year, and are free to choose their own hours thereafter. In the event any subsequent advertisement prepared pursuant to this paragraph differs significantly from the first advertisement disseminated in accordance with this paragraph, DADA shall conduct or cause to be conducted copy testing of the subsequent advertisement in the same manner and for the same purpose as described above.

V.

It is further ordered, That each dealership and individual respondent shall, while Part III of this order is in effect, disclose its hours of operation in all of its advertising, except that such disclosure is not required in advertisements offering for sale a single, particular motor vehicle. In any print advertisements, the disclosure shall be displayed in a type size at least as large as that in which the principal portion of the

text of the advertisement appears, and the disclosure shall be highlighted so that it can be readily noticed. In television advertisements, the disclosure shall be presented in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur and the rate of speech shall be the same as for the other parts of the advertisement.

VI.

It is further ordered, That each association respondent shall, for a period of five (5) years from the date this order becomes final, cause to be made a notarized stenographic transcription of all business meetings of its membership, board of directors, or committees, and shall retain such transcript for a period of five (5) years from the date of the transcription. Such transcripts shall be provided to the Commission upon request.

VII.

It is further ordered, That each association respondent shall:

A. Within sixty (60) days from the date this order becomes final, amend its bylaws, rules and regulations to eliminate any provision inconsistent with any provision of this order;

B. Within sixty (60) days from the date this order becomes final, amend its bylaws, rules and regulations to incorporate: (1) a provision that prohibits its members from discussing at any formal or informal membership, board of directors, or committee meeting the hours of operation of any dealer, except to the extent necessary to comply with any order of the Federal Trade Commission; and (2) a provision that requires expulsion from membership of any member who violates such prohibition;

C. Within ten (10) days after the amendment of any bylaws, rules or regulations pursuant to this order, furnish a copy of such amended bylaws, rules or regulations to all members, and within ten (10) days of any new member joining association respondent, furnish to such new member a copy of the bylaws, rules and regulations of association respondent; and

D. Within thirty (30) days after receiving information from any source concerning a potential violation of any bylaw, rule, or regulation required by Part VII.B of this order, investigate the potential violation, record the findings of the investigation, and expel for a period of one (1) year any member who is found to have violated any of the bylaws, rules or regulations required by Part VII.B of this order.

VIII.

It is further ordered, That each association respondent shall, for a period of five (5) years from the date this order becomes final, provide to the Commission the name and address of any member expelled pursuant to the requirements of Part VII.D of this order within ten (10) days after such expulsion.

IX.

It is further ordered, That within ten (10) days after the date this order becomes final, each dealership and individual respondent shall provide a copy of the order to each of its employees and each association respondent shall provide a copy of the order to each of its officers, directors, members and employees. For a period of five (5) years from the date this order becomes final, each dealership and individual respondent shall provide a copy of the order to each new employee involved in motor vehicle sales or leasing, and each association respondent shall provide a copy to each new member,

within ten (10) days after the date the employee is hired or the new member joins the association respondent.

X.

It is further ordered, That each respondent shall, within ninety (90) days after this order becomes final and annually thereafter for a period of five (5) years, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order.

XI.

It is further ordered, That for a period of five (5) years from the date this order becomes final, each dealership respondent and association respondent shall notify the Commission at least thirty (30) days prior to any proposed change in corporate status (such as dissolution, assignment, or sale) that results in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in any corporate respondent which may affect compliance obligations arising out of the order. Each individual respondent shall, for five (5) years from the date the order becomes final, promptly notify the Commission of the discontinuance of his present business or employment and of any new affiliation or employment with any dealer or dealer association. Such notice shall include the individual respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of the respondent's duties and responsibilities in connection with the new business or employment.

By the Commission, Commissioner Machol not participating.
Donald S. Clark Secretary ISSUED: February 22, 1989

ATTACHMENTS—Addendum A, Addendum B, Addendum C, Opinion of the Commission

Addendum A

Dealership Respondents

Barnett Pontiac-Datsun, Inc.
Jim Causley Pontiac-GMC Truck, Inc.
Jim Fresard Pontiac, Inc.
Red Holman Pontiac-Toyota-GMC Truck Co.
Art Moran Pontiac-GMC, Inc.
Packer Pontiac Co., a Division of the Packer Corp.
Rinke Pontiac-GMC Co.
Bob Sellers Pontiac-GMC, Inc.
Shelton Pontiac-Buick, Inc.
Porterfield Wilson Pontiac-GMC Truck, Inc.
Woody Pontiac Sales, Inc.
Jack Cauley Chevrolet, Inc.
Dexter Chevrolet Co.
Dick Genthe Chevrolet, Inc.
James-Martin Chevrolet, Inc.
Jefferson Chevrolet Co.
Lou LaRiche Chevrolet-Subaru, Inc.
Walt Lazar Chevrolet, Inc.
Mark Chevrolet, Inc.
George Matick Chevrolet, Inc.
Matthews-Hargreaves Chevrolet Co.
Merollis Chevrolet Sales & Service
Ed Rinke Chevrolet-GMC Co.
Mike Savoie Chevrolet, Inc.
Les Stanford Chevrolet, Inc.
Steward Chevrolet, Inc.
Tennyson Chevrolet, Inc.
Buff Whelan Chevrolet, Inc.
Wink Chevrolet Co. d/b/a Bill Wink Chevrolet/GMC
Greenfield AMC/Jeep-Renault, Inc.
Village AMC/Jeep, Inc. Armstrng Buick-Opel, Inc.

Jim Carney Buick Co.
Fischer Buick-Subaru, Inc.
Bill Greig Buick-Opel, Inc.
Krajenke Buick Sales, Inc.
Tamaroff Buick-Honda, Inc.
Audette Cadillac, Inc.
Crissman Cadillac, Inc.
Charles Dalgleish Cadillac-Peugeot, Inc.
Dreisbach & Sons Cadillac Co.
Roger Rinke Cadillac Co.
Birmingham Chrysler-Plymouth, Inc.
Lochmoor Chrysler-Plymouth, Inc.
Shelby Oil Company, Inc.
Roseville Chrysler-Plymouth, Inc.
Bill Snethkamp, Inc.
Thompson Chrysler-Plymouth, Inc.
Westborn Chrysler-Plymouth, Inc.
Colonial Dodge, Inc.
Crestwood Dodge, Inc.
Garrity Motor Sales, Inc.
Mt. Clemens Dodge, Inc.
Northwestern Dodge, Inc.
Oakland Dodge, Inc.
Sterling Heights Dodge, Inc.
Van Dyke Dodge, Inc.
Avis Ford, Inc.
Jerry Bielfield Co.
Beverly John Ford
Jack Demmer Ford, Inc.
Gorno Brothers, Inc.
Jerome-Duncan, Inc.
Al Long Ford, Inc.
McDonald Ford Sales, Inc.
Pat Milliken Ford, Inc.

Russ Milne Ford, Inc.
North Brothers Ford, Inc.
Ed Schmid Ford, Inc.
Stark Hickey West, Inc.
Bob Thibodeau, Inc.
Ray Whitfield Ford
Arnold Lincoln-Mercury Co.
Avon Lincoln-Mercury, Inc.
Bob Borst Lincoln-Mercury, Inc.
Crest Lincoln-Mercury Sales, Inc.
Bob Dusseau, Inc.
Stu Evans Lincoln-Mercury, Inc., of Garden City
Stu Evans Lincoln-Mercury, Inc., of Southgate
Hines Park Lincoln-Mercury, Inc.
Krug Lincoln-Mercury, Inc.
McInerney, Inc.
Bob Maxey Lincoln-Mercury Sales, Inc.
PHP d/b/a Park Motor Sales Co.
Star Lincoln-Mercury, Inc.
Charnock Oldsmobile, Inc.
Drummy Oldsmobile, Inc.
Gage Oldsmobile, Inc.
Bill Rowan Oldsmobile, Inc.
Suburban Oldsmobile-Datsun, Inc.
Autobahn Motors, Inc.
McAlister Motors, Inc.
Melton Motors, Inc.
Sterling Motors, Inc.
Wood Motors, Inc.
Pointe Dodge, Inc.

Addendum B

Individual Respondents

W. Robert Allen
Thomas Armstrong
Charles Audette
Frank Audette
Robert F. Barnett
Jerry M. Bielfield
Robert C. Borst
Robert M. Brent
Paul Carrick
John H. Cauley
James F. Causley, Sr.
J. Herbert Charnock
John Cueter
Charles Dalgleish, Jr.
Douglas Dalgleish
John E. Demmer
Harry C. Demorest
Al Dittrich
Thomas S. Dreisbach
John L. Drummy, Sr.
Richard J. Duncan
Robert Dusseau
Stewart Evans
Arnold Feuerman
Richard Flannery
John Ford
F. James Fresard
Frank Galeana
James A. Garrity
Richard E. Genthe
James Daniel Hayes
William Hickey
Albert A. Holman
Naiff H. Kelel
George Kolb
Sigmund Krug
Louis H. LaRiche
James P. Large
Walter N. Lazar
W. Desmond McAlister
Martin J. McInerney
George S. Matick, Jr.
Robert Maxey
Kenneth Meade
George Melton
Norman A. Merollis
Zigmund F. Mielnicki
W.B. (Pat) Milliken
Russell H. Milne
Arthur C. Moran
James E. North
James Riehl
Roger J. Rinke
Roland Rinke
William Ritchie
Arthur J. Roshak
William H. Rowan
Myron P. Savoie
Edward F. Schmid
Robert B. Sellers

C.M. (Bud) Shelton
Joseph B. Slatkin
William Snethkamp
Leslie J. Stanford
Gordon L. Stewart
Marvin Tamaroff
James P. Tellier
Harry Tennyson
Raymond R. Tessmer
Robert Thibodeau
Joseph P. Thompson
Anthony J. Viviano
Raymond J. Whitfield
Stanley A. Wilk
Porterfield Wilson
William J. Wink, Jr.
Donald Wood
Woodrow W. Woody
Robert Zankl

Addendum C

Association Respondents

Detroit Auto Dealers Association, Inc.
Tri County Pontiac Dealers Association, Inc.
Greater Detroit Chevrolet Dealers Association, Inc.
Chrysler and Plymouth Dealers Association of Greater Detroit, Inc.
Greater Detroit Dodge Dealers Association, Inc.
Metro Detroit AMC Dealers Association, Inc.
Metro Detroit Buick Dealers Association, Inc.
Metro Detroit Cadillac Dealers Association, Inc.
Metropolitan Detroit Ford Dealers, Inc.
Metropolitan Detroit Oldsmobile Dealers Association, Inc.
Metropolitan Lincoln-Mercury Dealers Association, Inc.
Southeastern Michigan Volkswagen Dealers Association, Inc.
Metropolitan Detroit Chevrolet Dealers Advertising Association, Inc.
Chrysler Plymouth Dealers of Greater Detroit Advertising Association, Inc.

Metro Detroit AMC Advertising Association, Inc.
Ford Dealers Advertising Fund, Inc.
Lincoln-Mercury Dealers Advertising Fund—Detroit District, Inc.
Tri County D.A.A., Inc.

APPENDIX 3

Initial Decision

In the Matter of
DETROIT AUTO DEALERS ASSOCIATION, INC. ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 9189, Complaint,* Dec. 20, 1984
— Final Order, Feb. 22, 1989

This final order requires, among other things, the Detroit, Mich.-area automobile dealrships to remain open a minimum of 64 hours a week for one year and to post conspicuously their hours of operation. The order prohibits all of the respondents from conspiring in any way to fix hours of operation, and requires the associations to amend their bylaws, rules, and regulations to eliminate any provision inconsistent with any provision of this order.

Appearances

For the Commission: *Dennis F. Johnson.*

For the respondents: *Katherine S. Nucci, Judy P. Jenkins & Howard E. O'Leary, Dykema, Gossett, Spencer, Goodnow & Trigg,* Washington, D.C. *J.F. Rill & Jeffrey W. King, Collier, Shannon, Rill & Scott,* Washington, D.C. *Glenn A. Mitchell, Stein, Mitchell & Mezines,* Washington, D.C. *Lawrence F. Raniszeski, Colombo & Colombo,* Birmingham, Mi. *Fred L. Woodworth, Dykema, Gossett, Spencer, Goodnow & Trigg,* Detroit, Mi. and *John F. Youngblood, Abbott, Nicholson, Quilter, Esshaki & Youngblood,* Detroit, Mi.

*Complaint previously published at 108 FTC 193.

Initial Decision By
James P. Timony, Administrative Law Judge
July 14, 1987

I. INTRODUCTION

The Commission's Complaint, issued December 20, 1984, charges that 105 motor vehicle dealerships, 19 dealer associations, and 115 individuals in the Detroit area[1] agreed to close all day on Saturday and to limit evening hours to Monday and Thursday, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The Complaint further alleged, in paragraph 5, that respondents attempted to coerce dealers into these hours of operation by threats of physical harm or property damage and by obstructing the business of dealers who did not comply.

The Complaint also alleged, in Count II, that some of the respondents conspired to restrict newspaper advertising of motor vehicles.

In due course, respondents filed Answers denying the substantive allegations and asserting affirmative defenses. The usual motion and discovery practice commenced.[2]

The Commission, on June 25 and August 6, 1986, dismissed 39 respondents and Count II of the Complaint.[3] The trial

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[1]"Detroit area" is defined as the Detroit, Michigan metropolitan area, comprising Macomb County, Wayne County and Oakland County in the State Michigan. (CX 3708)

[2]One unusual motion was by intervenor Post-Newsweek Stations, Inc. to videotape the trial. The motion was denied by order filed September 5, 1986.

[3]Other respondents have also been dismissed. Order of March 31, 1987; Commission order of November 27, 1985.

began on July 10, 1986, with complaint counsel's case-in-chief concluding on July 17. Respondents then filed a motion to dismiss paragraph 5 of the Complaint on grounds that complaint counsel failed to establish a prima facie case with respect to its allegations of coercion by respondents. Complaint counsel did not oppose the motion. The motion was granted on August 14, 1986.

Respondents' defense case began on July 21 and concluded on September 26, 1986. Complaint counsel's rebuttal case began on October 27 and concluded on October 29, 1986.

The record consists of 5,087 pages of trial transcript and about 4,000 exhibits. This includes the trial testimony of 74 witnesses, the transcripts of 65 depositions and investigational hearings, and stipulations as to what non-testifying respondents would have stated on direct examination if called to testify at trial.

The record was kept open after the conclusion of the trial for in camera motions by respondents and third parties (orders filed January 5 and January 27, 1987), and in order to afford the parties an opportunity to review transcripts and exhibits for correction of errors and the introduction of supplemental or modified exhibits into the record.[4] The parties filed proposed findings on April 21, 1987, and replies on June 5, 1987.[5]

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[4]See orders filed on January 20, 1987, March 10, 1987, April 14, 1987, April 16, 1987, April 29, 1987 and May 6, 1987.

[5]Proposed findings not adopted in the form or substance proposed are rejected, as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:
CX — (Complaint counsel's exhibits)
RX — (Respondents' exhibits)
JX — (Joint exhibits)
F. — (Finding)
Testimony is cited by the name of the witness, followed by transcript page.

II. FINDINGS OF FACT

A. Respondents

1. There are about 231 motor vehicle dealerships in the Detroit tri-county area franchised to sell new motor vehicles. (JX 2A-Z7.) Of these, 96 are respondents. Each dealership respondent is a member of both the Detroit Auto Dealers Association, Inc. ("DADA") and its respective line group association. (CX 175.)

2. There are 81 individual respondents. James Daniel Hayes has been the DADA executive vice president since January 1, 1975. All others all have owned or operated new car dealerships in Detroit.

3. Eleven line group associations and six line group advertising associations are respondents in this proceeding. A line group is composed of dealers who sell the same line of cars. (CX 205H.) An advertising association conducts cooperative advertising with the car manufacturer. (JX 13A-B.)

4. Detroit Auto Dealers Association's members are Detroit area new car dealers. (CX 28E.) Only a few domestic dealerships and import dealerships in the Detroit area are not members. (CX 3824; Hayes Tr. 17, 19.)

5. DADA promotes the business affairs of its members by running the Detroit auto show, keeping statistical information concerning new car sales, and providing a forum for the exchange of ideas by its members. (Hayes Tr. 3919- 20, 3939-44.)

6. The DADA is managed by its board of directors, consisting of one representative from each new motor vehicle line group that has at least seven members in the DADA. (CX 28G.)

B. Interstate Commerce

7. Except for respondent James Daniel Hayes, the other respondents do not contest having engaged in activities which are in or affect commerce.

8. James Daniel Hayes is Executive Vice President of the DADA. (Hayes Tr. 3917.) Mr. Hayes runs the association at the direction of the board of directors. (Hayes Tr. 3920.) Mr. Hayes is also engaging in activities which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act. (Hayes Tr. 3939-45.)

C. Agreements to Restrict Hours

9. Until 1959, Detroit area motor vehicle dealerships were open every weekday evening and on Saturdays. (CX 3866; Whelan Tr. 39, 11; CX 3853.)

10. A 1953 Michigan "blue law" prohibits any dealership from buying or selling new or used motor vehicles on Sunday. Mich. Comp. Laws Ann. § 435.251 (West 1978). The DADA took an active role in pushing for the 1953 Sunday closing law. (CX 3537.)

1. Agreements to Close Wednesday and Saturday Evenings

11. On June 22, 1959, the DADA Board of Directors announced that the great majority of dealers would welcome the opportunity to close their dealerships two nights a week. DADA sent a letter to its member dealers recommending that, effective July 1st, dealers close both their new car showroom and their used car lots, at 6:00 p.m. on Wednesdays and Saturdays. (RX 1, RX 2A.)

12. In July and August of 1959, the DADA advertised in the Detroit Free Press and Detroit News that dealers in the

Detroit area were closing now at 6:00 p.m. on Wednesdays and Saturdays. (CX 3360, CX 3361, CX 3362.)

13. On August 17, 1959, the DADA announced considerable progress in its efforts to convince the dealers that they should close at 6:00 p.m. on Wednesdays and Saturdays. For four makes of cars, all dealers were closed. For five other makes of cars, only one dealer per make was open. Overall, 70.5% of the dealers surveyed by the DADA were closed. (RX 3A.)

14. In August 1960, the Detroit area Chevrolet dealers voted at their line association meeting to close all new and used car and truck sales departments on Wednesdays and Saturdays at 6:30 p.m., and on six holidays. (CX 400A.)

15. On September 1, 1960, the DADA advised its members that Chevrolet dealers and Buick dealers had agreed among themselves to close their new and used car showrooms at 6:30 p.m. on Wednesdays and Saturdays. (CX 109A.)

16. On September 14, 1960, the Greater Detroit Chrysler Association announced that Chrysler dealers of Greater Detroit had agreed to close their new car showrooms and used car lots at 6:00 p.m. on Wednesdays and Saturdays. (CX 3378, CX 3379.)

17. On September 23, 1960, the DADA announced temporary increases in operating hours during the week that new 1961 model cars were being introduced but that all 13 line groups will resume their present policy of evening closings. (CX 111.)

18. By the end of 1960, the DADA hours limitation program had achieved widespread success. (CX 114.)

2. Agreements to Close Friday Evenings

19. On October 31, 1960, DADA wrote to the dealers announcing that the Wednesday and Saturday evening closings

had proven very worthwhile and asked the dealers whether they would like to add Friday evening closings to the other two evenings. (CX 112.)

20. On November 10, 1960, DADA announced that Lincoln-Mercury dealers had voted to close their dealerships at 6:00 p.m. on Friday evenings. (CX 113C.)

21. On December 8, 1960, DADA stated that 79% of the dealers indicated that they would be willing to close one additional evening, either Friday or some other evening in addition to Wednesdays and Saturdays. (CX 115A, CX 118D, CX 112, CX 114.)

22. At a meeting on February 23, 1961, at DADA headquarters, attended by DADA directors, several line group presidents and dealers from each line group, they decided to recommend to the dealers that they close their dealerships on Fridays at 6:00 p.m., beginning Friday, March 3rd. Each DADA member dealer was provided with four signs for the dealership's windows stating that: "This dealership closes at 6:00 p.m. on Wednesdays, Fridays, and Saturdays." (CX 120, CX 136E.)

23. At a meeting on March 8, 1961, the DADA Executive Committee decided to notify dealers that cooperation on the Friday evening closing had been excellent, and the majority of the dealers had been closing that evening. (CX 121A-B, CX 123A.)

24. On March 14, 1961, at a general meeting of the Greater Detroit Chevrolet Dealers Association, the Chevrolet dealers voted (with only one vote opposed) to add Fridays to their Wednesday and Saturday night closing, commencing March 24th. (CX 405.)

25. On November 21, 1961, the Ford dealers announced

they would be closing at 6:00 p.m. on Wednesday, Friday and Saturday evenings. (CX 135.)

26. The DADA Board of Directors met on March 13, 1962 and discussed evening closings. (CX 138A.) This was part of what the DADA President described as: "our campaign of urging dealers to close their places of business at 6:00 p.m. on Wednesday, Friday, and Saturday evenings." (CX 144C.)

27. The DADA Board of Directors, on November 13, 1962, discussed 15 Ford dealers who were remaining open on Friday evenings. "[I]t was decided that the directors should contact the offending Ford dealers and try to persuade them to resume their closing on Friday evenings." (CX 141A.)

28. At a DADA Board of Directors meeting on April 15, 1964, there was "a lengthy discussion of the ways and means by which DADA could police the evening closing program." (CX 153A.)

29. A DADA survey in April 1964 showed that 88% of the DADA member dealers (203 out of 231 dealers) were in compliance with the evening closing program. Of the 28 dealers who were not in compliance, 14 were Ford dealers. Ten dealers said they would close all three evenings if a majority of the dealers did so. (CX 158.)

30. The DADA Board of Directors advised the dealers of the survey results. (CX 157B, CX 159.)

31. On April 21, 1965, Mr. Tope, the Executive Vice President of DADA, explained the DADA evening closing program. CX 164:

> We are continuing our efforts to get all DADA members to close their dealerships at 6:00 p.m. on Wednesdays, Fridays, and Saturdays.

> To that end we are attempting to determine which dealers are remaining open. After we learn this, we plan to write to each one soliciting his cooperation. If that fails, we will place advertisements in the suburban newspapers which cover the areas in which the uncooperative dealers are located, stating that new car dealers in Wayne, Oakland, and Macomb counties close at 6:00 p.m. on Wednesdays, Fridays, and Saturdays.

32. Mr. Tope then sent letters to 13 dealers urging them to close on Wednesday, Friday, or Saturday evenings. (CX 168A, CX 81A.)

33. At its June 15, 1965 meeting, the DADA Board of Directors authorized Mr. Tope to place ads in the Detroit newspapers stating that "DADA members in the tri-county area are closed Wednesday, Friday and Saturday evenings." (CX 81A.) In July, the DADA announced to the public that: "The Detroit Auto Dealers Association has established as the closing hour for all new car dealerships: 6 P.M. on Wed., Fri. and Sat. Evenings." (CX 3300.)

34. On September 28, 1965, the Board of Directors of the Greater Detroit Chevrolet Dealers Association agreed to a "regulation:" "All members of the Association will close all new and used car and truck sales departments on Wednesday, Friday and Saturday at 6:30 P.M." (CX 302A.)

3. Agreements to Close Tuesday Evenings

35. The DADA Executive Vice President explained the joint evening closings in a March 18, 1966 letter to a dealer. CX 171:

> Our association has worked on this evening closing project for several years, to a point where practically all new car dealers are closed three evenings

a week. This situation has proven popular, not only with the dealership employees, but with the dealers themselves. They have found that they have been able to somewhat reduce their costs, and more importantly they have improved their grosses. This has been brought about by the fact that with fewer shopping hours, the public can devote less time to shopping, and consequently forcing down prices.

36. On July 11, 1966, the Board of Directors of the Greater Detroit Chevrolet Dealers Association ("GDCDA") voted unanimously to recommend to the membership that they close their dealerships on Tuesdays at 6:30 p.m. (CX 306A-B.) Later that day at the general meeting of the GDCDA, 20 dealers voted to close all sales departments at 6:30 p.m. on Tuesdays. By August 4, 1966, all Chevrolet dealerships except two had closed on Tuesday evenings. (CX 309B.)

37. DADA encouraged all dealers in the Detroit area to close their motor vehicle sales operations on Tuesday evenings. (CX 310A.)

4. Agreements to Close Saturdays During Summers

38. At a meeting of the Southeastern Michigan Volkswagen Dealers Association on April 4, 1967, the Volkswagen dealers unanimously agreed that all would close their sales rooms on Tuesday evenings. (CX 1308.)

39. On July 11, 1966, the Board of Directors and the general members of the Greater Detroit Chevrolet Dealers Association discussed closing the dealerships at 12:00 noon on Saturdays during the summer months. (CX 306B, CX 307B.)

40. At a meeting on March 26, 1969, members of the Metropolitan Detroit Pontiac Dealers Association voted unanimously to close their dealerships on Saturdays effective

May 31, 1969, but to reopen Tuesday evenings, for the summer months. (CX 209A, CX 211A, CX 1309A.) The Chrysler-Plymouth dealers also agreed to close Saturdays during the summer. (CX 1309A; Burwell Tr. 2100; J. Thompson Tr. 1956-57.) On April 22, 1969, the Detroit Metropolitan Buick Dealers Association voted to close Saturdays and to open Tuesday evenings from May 30, 1969 through Labor Day. (CX 804C.) The majority of the Dodge dealers agreed to close on Saturday and open on Tuesday night during the summer. (CX 87C, CX 3307.)

41. By June 20, 1969, the Dodge, Chrysler-Plymouth, Pontiac, and Buick dealers, the Oldsmobile dealers (with two exceptions) and the Lincoln-Mercury dealers had decided to close on Saturdays for the summer, a total of 113 dealers. (CX 51.)

42. On May 1, 1970, DADA reported that the vast majority of Ford dealers had voted to close on Saturdays for the months of July and August. (CX 58, CX 90B.) By this time, about 95% of DADA members agreed to follow the DADA's recommendation to close Saturdays for July and August, 1970. (CX 607A, CX 608B-C.)

43. At the June 23, 1970 meeting of the Greater Detroit Chevrolet Dealers Association, all but two Chevrolet dealers voted to close on Saturdays for July and August. (CX 325B, CX 1409.)

44. On February 25, 1971, the Buick dealers voted unanimously to close on Saturdays from May 29, 1971 through September 4, 1971. (CX 812B.) In March 1971, the Chrysler-Plymouth dealers agreed to close Saturdays for June, July and August. (CX 519B.) On March 4, 1971, the Pontiac dealers agreed unanimously to close on Saturdays from May 29, 1971, through September 4, 1971. (CX 216B.)

45. In March 1971, the Lincoln-Mercury dealers decided

to close on Saturdays from Memorial Day weekend through Labor Day weekend. (CX 1206, CX 93B, CX 95B.) A majority of the Oldsmobile dealers agreed to close Saturdays from May 29, 1971, through September 4, 1971. (CX 1111A.) The Pontiac, Buick, Oldsmobile, and Chrysler-Plymouth dealers agreed to close Saturdays from May 29, 1971 through September 4, 1971. (CX 217A.) A majority of the Dodge dealers decided to close on Saturdays from May 29, 1971 through September 4, 1971. (CX 612B-C.)

46. At the May 10, 1971 meeting of the Greater Detroit Chevrolet Dealers Association, the members voted overwhelmingly to close on Saturdays in June, July and August through Saturday, September 4, 1971. (CX 329A, CX 1113A-B.)

5. Agreements to Close Saturdays Year-Round

47. On October 31, 1973, the Buick dealers met and a majority voted to recommend closing Saturdays, year-round, effective December 1, 1973. (CX 824B.)

48. On November 12th, the Chevrolet dealers, by consensus, agreed that member- dealerships close on Saturdays beginning December 1, 1973. (CX 344.)

49. On November 13, 1973, the Dodge dealers voted to announce the closing of their dealerships on Saturdays, effective December 1, 1973, in the media. (CX 622B.)

50. On November 15, 1973, the Buick dealers agreed to close on Saturdays, effective December 1, 1973. (CX 825.) On November 19th, the Oldsmobile dealers agreed to close on Saturdays, year-round, effective December 1, 1973. (CX 1116B.) By November 30th, the Detroit Metropolitan Ford Dealers had agreed to close on Saturdays beginning December 1, 1973. (CX 3358.) By December 1st, the Lincoln-Mercury

dealers had also agreed to close their showrooms on Saturdays. (CX 3353.) The Chrysler-Plymouth dealers agreed to close Saturdays on a permanent basis on December 1, 1973. (J Thompson Tr. 1966-67.)

6. Effectiveness of Agreement

51. Of 231 new car dealerships in the Detroit area, eight have regular Saturday hours year-round. They are all franchised by foreign manufacturers. (JX 2.)

52. Seven of 231 new car dealerships in the Detroit area remain open after 6:30 p.m. for three or more nights per week. (JX 2.) In the communities around the Detroit area, 31 of 107 new car dealerships (29%) remain open for evening sales hours for three or more nights. (CX 3700, CX 4002F.)

7. Other Cities

53. Detroit is the only metropolitan area in the United States in which almost all new car dealerships are closed on Saturdays. (Gibbs Tr. 633-35; Beauchamp Tr. 679-80; CX 6111M.)

54. In the communities immediately surrounding the Detroit area, 88 out of 107 new car dealerships (82%) are open on Saturdays. (CX 3700, CX 4002A, CX 3819; Genthe Tr. 56-57.) In the Cincinnati area, all 135 new car dealerships are open on Saturdays. (CX 3701, CX 4002B.) In the St. Louis area, 159 out of the 161 new car dealerships (99%) are open on Saturdays. (CX 3703, CX 4002C.) In the Chicago area, all 364 new car dealerships are open on Saturdays. (CX 3704, CX 4002E.) In the Cleveland area, all 168 new car dealerships are open on Saturdays. (CX 3702, CX 4002D.)

55. In the Cincinnati area, 112 out of 135 new car dealerships (83%) stay open three or more nights. (CX 3701, CX 4002G.) In the St. Louis area, 143 out of 161 new car dealerships (89%) stay open three or more nights. (CX 3703, CX

4002H.) In the Chicago area, 354 out of 364 new car dealerships (97%) remain open three or more nights. (CX 3704, CX 4002J.)

56. In the Cleveland area, three out of 168 new car dealerships (2%) are open three or more nights. (CX 3702, CX 4002I.) However, the limited evening hours in Cleveland may be the result of collusion. (RX 3A, RX 984.)

D. Business Effect of Closings

57. On October 5, 1961, DADA urged dealers to resume closing their dealerships at 6:00 p.m. on Wednesday, Friday and Saturday evenings after they were open for one week to sell new models. Reasons cited for resuming the evening closings were that they "improve employee morale, cut down shopping, and enable dealers to reduce certain expenses." (CX 134.)

58. In October 1962, DADA again urged dealers to resume closings because the majority of dealers participated in it and "They like it because it improves employee morale [and] cuts down on shopping . . . . . " (CX 140.)

59. In a May 14, 1965 letter, the DADA Executive Vice President wrote to nonconforming dealers urging them to close on Wednesday, Friday and Saturday evenings. He stated that the closings improved employee morale, reduced costs, and minimized shopping by prospective buyers. (CX 166.)

60. A 1966 letter from the DADA Executive Vice President to a dealer explained that the joint closing program is intended to benefit the dealers by reducing shopping time afforded to consumers, thereby preventing consumers from bargaining down the prices of motor vehicles. CX 171:

Our association has worked on this evening closing project for several years, to a point where practically all new car

dealers are closed three evenings a week. This situation has proven popular, not only with the dealership employees, but with the dealers themselves. They have found that they have been able to somewhat reduce their costs, and more importantly they have improved their grosses. This has been brought about by the fact that with fewer shopping hours, the public can devote less time to shopping, and consequently forcing down prices.

61. In May, 1983, respondent Charles P. Audette, President of the Metro Detroit Cadillac Dealers Association, sent a memorandum to the members of the Association about sales activities at dealerships on Saturdays. Mr. Audette wrote that:

> Saturday closing began as a method of discouraging the Unionizing of salesmen. It has been successful in accomplishing this and the dealers experienced no drop in volume when they were operating for 5 instead of 6 days. In fact, grosses actually went up Our association is pledged to back a dealer who takes a labor strike, when he is the one who is right and is not provoking the strike. (CX 101, CX 909A.)

E. History Of Dealership Closings

1. Union Background

a. Detroit's Union History

62. The growth of union power in Detroit began with the formation of the United Auto Workers ("UAW") in 1935. (Babson Tr. 1144.) Within two years, the union movement became a powerful force in Detroit. (Babson Tr. 1147-48.) Since then, the unions have represented a major economic and political power in Detroit. (Babson Tr. 1148.)

63. Led by the UAW, unions became more militant in the 1930s. There were numerous strikes, especially in the automobile manufacturing industry. (Babson Tr. 1144.)

64. The UAW in 1936 pioneered the sit-down strike. (Babson Tr. 1144-45.) In a sit-down strike, the strikers occupy the employer's premises and prevent the employer from maintaining production for the duration of the strike. (Babson Tr. 1144-45.) Sit-down strikes are illegal. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

65. In 1937, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters") began to assert its power in Detroit. The Teamsters had fewer than 1,000 members in Detroit in 1937; by 1950, it had 20,000. (Babson Tr. 1154.)

66. The Teamsters negotiated multi-employer bargaining agreements among groups of trucking businesses. Some of their contracts encompassed hundreds of employers. Pursuant to these contracts, wages, hours and working conditions were uniform across entire industries. (Babson Tr. 1154.)

67. The Teamsters expanded to include warehouses, breweries, bottlers, bakeries, bookbinders and other businesses that required trucking services. (Babson Tr. 1154-55.)

68. In the late 1930s and 1940s, the Teamsters had a reputation for being extremely difficult in its organizational methods, and for using threats, coercion, and intimidation. (Colombo Tr. 1689.) Small businesses were especially apprehensive about having their employees organized by the Teamsters. (Babson Tr. 1155.)

69. There are two closely related concepts that appear in the union efforts to organize the employees at the automobile

dealers in the Detroit area. These concepts are uniformity of working conditions and multi-employer bargaining.

70. Unions want employers to provide their employees with the same wages, hours and working conditions as are provided throughout the industry. (Babson Tr. 1148-49.) A lack of uniformity in wages, hours and working conditions destabilizes the workplace and tends to decrease wages until uniformity is reached at the lower level. (Babson Tr. 1164.) The demand for uniformity was the main focus of the early union activities in Detroit. (Babson Tr. 1149; Somerville Tr. 3733.)

71. The most effective way for unions to achieve uniform working conditions is through multi-employer bargaining. It is the best vehicle a union can use to obtain uniform working conditions. (Stringari Tr. 1530.) Multi-employer bargaining is an important goal of many unions, because it makes it easier for the union to organize workers, and improves the union's power in bargaining. (Babson Tr. 1164.)

72. A union that is a party to a multi-employer bargaining agreement can, if it chooses, strike the entire industry at the same time, with devastating impact. (Stringari Tr. 1559; Colombo Tr. 1702; Somerville Tr. 3736.)

73. Or, in the same situation, a union can engage in whipsaw strikes, closing one employer while collecting dues from the non-striking employees to finance the strike. Once that dealer capitulates, the resulting contract sets a standard which is then imposed on the next dealer to be struck, and so on. (Burwell Tr. 2093-94.)

74. One way by which the line groups resisted the union's tactic of whipsaw strikes was to develop strike funds. (Stringari Tr. 1566-67.) The dealers would use the strike fund to help the struck dealer weather the strike. If the first dealer does not capitulate, the whipsaw is broken. (Burwell Tr. 2144- 45.)

The strike funds would not have been sufficient to defend a line group against a strike pursuant to a multi-employer bargaining agreement. (Burwell Tr. 2148.)

75. The various unions that were active in Detroit-area automobile dealerships consistently sought multi-employer bargaining. (Colombo Tr. 1712-13; Stringari Tr. 1324.)

2. First Efforts to Unionize Dealerships

76. Both the UAW and the Teamsters turned their attention to Detroit-area automobile dealers in the 1940s. Just prior to World War II, the sales departments of several Ford and Lincoln-Mercury dealers in the Detroit area were unionized by the Teamsters. (Stringari Tr. 1520.)

77. In 1945, the Teamsters sought to negotiate a complete multi-employer contract with the Ford and Lincoln-Mercury dealers. (Stringari Tr. 1520.) The dealers resisted multi-employer bargaining, and no contract was signed. (Stringari Tr. 1521.)

78. As the Teamsters concentrated on the "front end" of the dealerships (the sales department), the UAW approached the "back end" (the service department). UAW Local 415 had organized a number of service departments prior to the War, especially in the Ford, Lincoln-Mercury, Chevrolet and Buick lines. (Stringari Tr. 1514-15.) Each of those lines had entered into multi-employer bargaining with the UAW and each line group had a contract with the UAW covering the dealers in the line. (Stringari Tr. 1515.) Fiftytwo Ford dealers had agreed to a multi-employer contract following a two-week strike in 1942. (RX 957.)

79. In 1946, Attorney Arthur Stringari was retained by the Ford dealers to handle their labor relations and to negotiate the contract. (Stringari Tr. 1514.) Attorney Fred Colombo represented many of the General Motors dealers. (Colombo Tr. 1684.)

80. One of the major goals of the UAW was to expand its multiple-employer bargaining agreement to the dealers that were not yet unionized. (Colombo Tr. 1746, 1710; Stringari Tr. 1519.)

81. After lengthy negotiations, the parties reached an impasse in mid-1947. The UAW went on strike, beginning in August 1947. The strike was lengthy and violent, and it affected the nature of dealer/employee relations for decades. (Stringari Tr. 1516-19.)

82. At the time of the strike, there were seven Chevrolet dealerships where the back end employees were represented by the UAW, and 25 to 27 Chevrolet dealers that were not unionized. (Colombo Tr. 1686-88.) The union demanded that the seven induce the others to join the bargaining unit. (Colombo Tr. 1688.) Mr. Colombo advised the Chevrolet dealers to resist the pressure and reject inclusion in the bargaining unit. (Colombo Tr. 1691.)

83. The union struck two of the largest Chevrolet dealers, Jerry McCarthy Chevy and Ver Hoven Chevy, in order to force them to persuade the other dealers to accede to multi-employer bargaining. (Colombo Tr. 1691-92.)

84. In September 1947, the UAW had a "flying squadron" of several hundred strikers wearing helmets. (RX 945, RX 949, RX 952, RX 961.) They picketed McCarthy Chevy. (Colombo Tr. 1696; RX 952.) The flying squadron also picketed at Ver Hoven Chevy. (RX 949, RX 952.)

85. Violence during the 1947 strike was widespread. (RX 945.) The car of one non-union employee was burned at his home, and dealership windows were shot out. (RX 951.) One dealer, Warren Avis, was threatened that he would be "carried out on a slab." (RX 959.) An employee at Bill Brown Ford had a brick thrown through his window at home. (RX 948.)

Windows were also smashed at several dealerships. (RX 950B.) Nineteen union members were arrested following a riot at Floyd Rice Ford. (RX 958.) There was also picketing at Stark Hickey Ford by a "goon squad" and a two and a half hour riot at Northlawn Ford. (RX 959.) The leader of UAW served a jail sentence for assaulting a non-striker, and was forced to resign. (RX 960.)

86. The UAW increased pressure on the struck dealerships. The Teamsters would not cross the picket lines to deliver the cars, thereby denying the struck dealers cars to sell. (Colombo Tr. 1695.)

87. The strike continued at some dealerships until June 1948. (North Tr. 1427; Stringari Tr. 1517; Colombo Tr. 1698.) Following the strike in 1947-1948, the UAW concentrated on unionizing individual dealers for the next two years. (Colombo Tr. 1762; RX 971.)

88. Dealers who were involved in the 1947 strike were thereafter apprehensive about the prospect of further union disputes. (Wink Tr. 1602.)

89. Having seen the results from the city-wide UAW strike, counsel for the dealers continued to advise the dealers to resist multiple employer bargaining by all legal means. (Stringari Tr. 1527; Colombo Tr. 1701.) The dealers followed this advice. (Stringari Tr. 1528.) Counsel also advised that the dealers could best avoid unionization on a multiple employer basis by presenting a united front to the unions, and by making uniform concessions to their employees. (Stringari Tr. 1528; Colombo Tr. 1703.)

90. Part of the dealers' united front was the creation by the General Motors dealers of a fund to be used to compensate struck dealers for their losses. (Colombo Tr. 1769-70.) Similar funds were later created for the other line groups. (Stringari Tr. 1566.)

91. The dealers also recognized that they would have to make some concessions to their employees. However, they also recognized that concessions could provoke unionization if they were not uniform. (Colombo Tr. 1703; Stringari Tr. 1523.) This advice was repeated and followed over the 40 years following the UAW strike.

3. Demand for Shorter Hours

92. In the early 1950s, dealerships typically were open for sales from 9:00 a.m. to 9:00 p.m. Monday through Friday, and from 9:00 a.m. to 6:00 p.m. on Saturday. (Rehn Tr. 2686; W. Lee Tr. 1844; J. Thompson Tr. 1943.)

93. Some dealers were open much longer hours. (Dittrich Tr. 3150; Barnett, CX 3800 at 38-39.)

94. In addition to the posted hours, most dealerships held one or more sales meetings each week, typically beginning a half hour before the dealership opened. (Genthe, Sr. Tr. 2340; W. Lee Tr. 1845.)

95. The salesmen could not always leave work at the posted closing hour. If a salesman was with a customer, he would remain at work for as long as the customer remained in the showroom. (Rehn Tr. 1185; Mason Tr. 2155.)

96. In many instances, the salesmen were required by the dealer to work the full time the dealership was open. (Rehn Tr. 1185; Charnock Tr. 2686; Roscoe Tr. 1386.) At these dealerships, the work week was at least 69 hours. (Bretzlaff Tr. 1252; Mason Tr. 2157.)

97. At other dealerships, the salesmen were not required by the dealer to be at work the full time the dealership was open. (W. Lee Tr. 1844; RX 3442B.)

98. Car salesmen have always been paid by commission.

The commission is a percentage of the gross profit of the car (a percentage of the difference between the cost of the car and its sales price). (Rehn Tr. 1186.) Many dealers do not pay a commission on a "pack" (the cost of selling the car). (Thibodeau Tr. 2555.) In calculating the commission, the salesman is paid a percentage of the excess over cost plus pack for which the car is sold. (Carnahan Tr. 2239-40.)

99. There is pressure for a salesman to be present whenever the dealership is open, lest he miss an opportunity to make a sale. (Dittrich Tr. 3150-52; Charlebois Tr. 2208-09, 2212-13; Carnahan Tr. 2221; Bretzlaff Tr. 1258; Rehn Tr. 1192-93; W. Lee Tr. 1844-45.)

100. One of the pressures that forced salesmen to be present in the dealership whenever it was open is referred to as "skating." Skating is stealing someone else's customer. (Roscoe Tr. 1389.) A customer is skated if after negotiating with one salesman he returns to the dealership on a different day and the deal is closed by a different salesman. The closing salesman often takes the full commission. The original salesman, who may have spent several hours with the customer, receives no compensation. Skating is much more likely if the salesman is not on the sales floor when the customer returns, and this is one factor that led salesmen to be present whenever the dealership was open for business. (Roshak Tr. 2451.) Skating was such a problem that salesmen had fist fights over entitlements to commissions. (CX 3835 at 53-54; Dittrich Tr. 3189-90.)

101. During the 1950s, although many dealerships had shifts, most salesmen felt they had to be at the dealership during the showroom hours in order to protect themselves against skating, i.e., losing a returning customer and sale to a fellow salesman. As a result, salesmen frequently complained about

the length of the workweek. (RX 3442B-C; Roscoe Tr. 1387; Dittrich Tr. 3154.)

102. Because of the pressure to be present whenever the dealership was open, a salesman's work week was controlled by the dealership's hours of operation. (Roscoe Tr. 1388-89; Bretzlaff Tr. 1259-60; Mason Tr. 2159-60; Genthe, Sr. Tr. 2342-44; Ryan Tr. 2674-75.)

103. A salesman whose dealership is closed risks the loss of a commission if other dealerships are open. (Bretzlaff Tr. 1260-61; Roscoe Tr. 1389; W. Lee Tr. 1848-49.)

104. During the 1950s, salesmen demanded shorter hours of operation on a uniform basis throughout the Detroit area. (Tennyson Tr. 1795-96; J. Thompson Tr. 1945-46.)

4. Teamsters Campaign in 1954

105. Teamsters Local 376 launched a major campaign to unionize the salesmen in early 1954. The campaign initially focused on the Ford and Chevy dealers. The leaders of the Teamsters effort were Jimmy Hoffa and Henry Lower. (RX 971.)

106. By the time the campaign was publicly announced, 400 salesmen had already become members of the union. (RX 971.) Two weeks later, 1231 salesmen had signed up, and 750 salesmen attended a Teamsters organizational meeting. (RX 972, RX 974.) Ultimately, the Teamsters claimed 2700 members. (RX 802.)

107. In April 1954, the Teamsters demanded higher commissions. Another key demand was for a uniform shorter work week. (RX 980, RX 981B, RX 972.)

108. The Teamsters' immediate demand was for a uniform

shortening of hours. The salesmen's ultimate goal at that time was for a normal five-day work week. (Bretzlaff Tr. 1257; Stringari Tr. 1533-34.)

109. The Teamsters also sought multi-employee bargaining, and counsel again advised the dealers not to accede to this demand. (Colombo Tr. 1700-02.)

110. At the first organizational meeting, Teamsters threatened blocking of cars to dealerships. (RX 973B, RX 975, RX 976, RX 801A.)

111. Where there was no multi-employer bargaining, dealers could resist the threat to block deliveries by having cars delivered to non-struck dealers. In the case of a multi-employer strike, there would be no such safe havens, and the union could shut down the entire city. (Colombo Tr. 1701, 1747.)

112. The union struck several dealerships in late 1954. (RX 802.)

113. The Teamsters' effort was hindered because the National Labor Relations Board refused to take jurisdiction over Detroit dealerships unless they made interstate purchases of $1 million or interstate sales of $100,000. (RX 800, RX 801B.) The union withdrew many of its election petitions following a tightening of NLRB jurisdiction, and was defeated in most of the remaining elections. (RX 800, RX 803.) By December 1954, its efforts were limited to trying to organize the Ford dealers. (RX 803.)

114. Following the 1954 effort to organize the salesmen, the Teamsters shifted emphasis to the mechanics. (Stringari Tr. 1567; RX 804.)

115. The effort to organize mechanics in 1954 led to strikes, intimidation, and violence. Robert Sellers described a two-month strike at his father's dealership in 1954. The strike

was organized by the Teamsters who were then representing, or trying to organize, the mechanics. CX 3857 at 64-66:

> And the phone would ring at night, and there'd be nobody there. Just somebody breathing on the phone. We had to delist our phone number.
>
> If the Teamsters were sitting out in front of the house, we'd have to draw the drapes and I'd tell the children to get to the back of the house. It was a terrible thing.
>
> * * * *
>
> Jimmy Hoffa lived a block and a half from the dealership. Oh, we had some nice company down there. Johnny Kinghorn was a real handsome fellow that worked for us, was our service manager, real fine guy. They beat the tar out of him and knocked his teeth out. Johnny never went back into the car business. Got right out.

5. 1959-1961 Union Campaigns

116. In 1959, dealers were typically open from 9:00 a.m. to 9:00 p.m. during the week, and from 9:00 a.m. to 6:00 p.m. on Saturdays. (W. Lee Tr. 1852; Genthe, Sr. Tr. 2340.)

117. At some dealerships, the salesmen worked longer than the usual 69 hours (plus sales meetings and late customers). (Ryan Tr. 2651 (8:00 a.m. to 10:30 p.m. six days a week); Dittrich Tr. 3154 (80-85 hours a week).)

118. The salesmen continued to complain to management about the long work weeks. (Roscoe Tr. 1392; Bretzlaff Tr. 1256; Dittrich Tr. 3154.)

119. As had been the case in 1954, the salesmen's immedi-

ate goal in 1959 was a uniform shortening of the work week, and their long-range goal was a normal five-day work week. (Mason Tr. 2158; North Tr. 1436; Roshak Tr. 2453.)

120. Most salesmen felt that the problem with the excessive length of the work week could not be corrected by splitting shifts or otherwise giving salesmen time off while the dealership was open, and to do so would reduce the salesmen's wages. The salesmen therefore resisted split shifts where the dealers suggested it. (North Tr. 1436-37; McIntyre Tr. 1990.)

121. Even where split shifts were tried, the salesmen usually worked the full time the dealership was open, lest they lose commissions through skating or by not being available when their customer came to the store. (W. Lee Tr. 1952; RX 3444B.)

122. The salesmen in 1959 demanded uniform shorter hours of operation for all dealerships throughout the metropolitan area. (Ryan Tr. 2656-59; McIntyre Tr. 1989; Bretzlaff Tr. 1259-61; Roshak Tr. 2453; Mason Tr. 2158-60; North Tr. 1440.)

123. The efforts by the salesmen to convince management to shorten the hours of operation of the dealerships were unsuccessful. (W. Lee Tr. 1849.) The salesmen therefore turned again to the union.

124. The Teamsters had continued to organize the salesmen after the 1954 campaign, but without much success until an election among the salesmen at the three Cadillac factory branches in April 1959. (RX 804.) The election marked the beginning of a major Teamsters effort to unionize the salesmen in the Detroit area.

125. One factor that led to the resurgence of the Teamsters in 1959 was that the NLRB expanded its jurisdiction in October 1958. (RX 804.)

126. The 1959 organizing campaign was headed by Edward Petroff, Sr. (RX 804.) Multi-employer bargaining was the Teamsters' goal throughout the 1959-1961 organizing effort. (RX 805C.)

127. Petroff's city-wide effort resulted in the filing of petitions for elections among salesmen at about 150 dealerships. (RX 807B.)

128. During the Teamsters campaign, a new union appeared. The Salesmen's Guild of America ("Guild") began to unionize salesmen in June 1960. (RX 807B.) In September, the Guild filed election petitions at 20 dealerships. (RX 805C.) The Guild, like the Teamsters, intended to proceed through multi-employer bargaining. (RX 805F.)

129. The two unions made similar demands. (RX 3441B, RX 3444C.) The Guild demanded shorter work weeks, and wanted higher commissions and other benefits. (RX 806B.) The guild's proposed contract in September 1960 would limit the salesmen's work week to five days, although the dealership would remain open six days a week from 8:30 a.m. to 6:00 p.m. (RX 805D.)

130. In 1959 and 1960, the Teamsters also sought uniform five-day work weeks, higher commissions and other benefits. (Tennyson Tr. 1790-91; RX 700, RX 701.)

131. Both unions demanded "that all Detroit area dealerships conform to the same reduced showroom hours." (RX 3441B.) The uniformity was necessary so that the salesmen would not risk the loss of commissions to salesmen at dealerships with longer hours. (RX 3441B-C; RX 3444C; Ryan Tr. 2656-59.)

132. Although the unions were active only at some of the dealerships, all dealers were concerned with the union threat.

The dealers had been advised that union successes tend to lead to more union victories at other dealerships. (Colombo Tr. 1708-09; W. Lee Tr. 1854-55; Genthe, Sr. Tr. 2347-48.)

133. Success at some dealerships could also be exploited by the union to lead to multi-employer bargaining, a process that counsel recommended against. (Colombo Tr. 1710; Stringari Tr. 1532-33.)

134. The Chrysler dealers established a fund to be used to pay the legal fees of any dealer with labor problems. (RX 308.) The Ford and Lincoln-Mercury dealers also established strike funds. (RX 338.)

135. In 1959-1961, the unions demanded uniformity. (Colombo Tr. 1707; JX 6B.) Because employees could legally demand uniformity in wages, hours and working conditions, and because lack of uniformity often leads to industry-wide unionization, the dealers conceded to their employees' demand for uniformity. (Stringari Tr. 1528-29; Colombo Tr. 1708.)

136. The dealers discussed the demands at the line group meetings. (J. Thompson Tr. 1943-44; W. Lee Tr. 1856-57.) In September 1960, the line groups recommended minimum employment standards designed to match most of the demands announced by the two unions. (RX 807C.) The Lincoln-Mercury dealers instituted a wide range of uniform concessions: paid vacations, partial payment of hospitalization and life insurance, lower cost demos, limits on house deals and a higher monthly draw. They also gave their employees a shorter work week, including closing at 6:00 p.m. on Wednesday and Saturday, and a 44 hour week. (RX 806C.)

137. In September 1960, the Chevy dealers closed their showrooms at 6:30 p.m. on Wednesday and Saturday nights, and began providing a minimum commission of $50 per sale.

(RX 805F-G.) They also began providing paid vacations, and paying 50% of the cost of health, accident and welfare insurance. (RX 806D.)

138. In September 1960, the Ford dealers made similar concessions: early closings on Wednesday and Saturday, paid vacations, $50 minimum commission, $100 weekly draw and a demo plan. (RX 806C-D.)

139. In September 1960, the Chrysler dealers also closed early on Wednesday and Saturday nights in response to the union demands. (RX 806E.)

140. Don McIntyre reduced his hours at Superior Oldsmobile because making that concession uniformly with other dealers would lessen the risk of unionization. (McIntyre Tr. 1993.) Barnett Pontiac began closing because it "was having severe labor problems at that time, a lot of pressures." (CX 3800 at 40.)

141. Other respondent dealers reduced their hours in 1960 to respond to demands by employees for uniform reduction of hours of operation and to obtain labor peace and stable labor relations and to avoid unionization. (JX 6B.)

142. In 1960, each of the respondent associations recommended to its members that they make certain uniform reductions in showroom hours of operation in response to demands for such uniformity of employees and their representatives. In certain instances, an association advised its members of the effective dates for the recommended hours reductions. (JX 8B-C.)

143. The salesmen continued to complain about the hours and many dealers responded within a few months by closing early on Friday evenings. (Roscoe Tr. 1392-93; Mason Tr. 2163-64; JX 8B-C.)

144. By giving in on the hours issue, many of the dealers hoped to avoid being unionized. They felt that the salesmen were more interested in improvements in working conditions than in the union. (Genthe, Sr. Tr. 2342, 2346-48; Wink Tr. 1620; Tennyson Tr. 1800-02.)

145. The strategy of uniform concessions was successful. By December 1960, the Guild won only two of its first thirteen elections, and the Teamsters lost 18 of 19 elections. (RX 808, RX 809.)

146. The Salesmen's Guild made an effort in 1962 to organize salesmen. It filed another four election petitions in 1962, but was defeated in all four elections. Both the Teamsters and the Guild ceased organizational activities. (RX 812.)

147. The few dealers that had not closed on Friday nights in 1961 faced continued pressure from their salesmen, and ultimately closed. (North Tr. 1454.) In 1962, the salesmen at John McAuliffe Ford went on strike. The principal issue in the strike was the length of the work week. (Bretzlaff Tr. 1267.)

148. The recalcitrant dealers were pressured by the Teamsters to shorten their hours. Ed Schmid purchased a Ford dealership in 1961 or 1962. (Schmid Tr. 1891.) The Teamsters and his salesmen pressured him to close in the evening during the early 1960s. (Schmid Tr. 1894.) Spitler-Demmer Ford was still open on Friday evenings in 1963, though most other dealers had closed. The dealership was subjected to continuing pressure by its salesmen, and ultimately closed on Friday at 6:00. (Demmer Tr. 2571-72.)

149. Salesmen protested the length of the work week throughout the 1962-1966 period, seeking further reductions. (Roshak Tr. 2460; Charnock Tr. 2691-92.)

150. The dealers understood that the salesmen's dissatisfaction could erupt into another union organizing campaign. The union was always there, and was always a threat, even when it was not actively organizing the salesmen. (W. Lee Tr. 1859; CX 411B; RX 813.)

6. Automotive Salesmen Association

151. Despite the advances in the early 1960s, the salesmen still faced the problem of lengthy work weeks. This led to the formation of a new union, the Automotive Salesmen Association ("ASA").

152. The ASA was created by Tim Mulroy, an employee at Jim Davis Chevrolet, and it began recruiting in February or March 1966. (Carnahan Tr. 2215, 2219.) The two issues that primarily motivated Mulroy to form a union of salesmen were "to close on Saturdays" and to increase pay. (Carnahan Tr. 2215.) Mr. Carnahan, who was one of the first recruiters for the ASA, became involved for the primary reason of shortening the work week by closing the dealerships on Saturdays. (Carnahan Tr. 2219.)

153. Primary among the ASA's objectives was the demand for a shorter work week. (Roscoe Tr. 1395; North Tr. 1456-57; Wink Tr. 1624.) The union's immediate goal was for dealerships to close all five evenings and in the early afternoon on Saturdays. (RX 712A; W. Lee Tr. 1882; RX 2958C.) Its long range demand was for dealerships to close all day on Saturdays. (Demmer Tr. 2576.) The literature passed out by the ASA organizers emphasized the goal of shortening the work week by closing in the evenings and Saturday. (RX 753B, RX 720, RX 717B.)

154. The sales employees representing ASA presented their grievances about hours to the dealers. (Roscoe Tr. 1395; Demmer Tr. 2578.)

155. One of the reasons the dealers were so concerned with the prospect of being unionized is that they knew what the result of unionization had been in San Francisco. The unionized sales force in San Francisco obtained such high commissions that the unionized dealers were no longer competitive with the non- unionized dealers in the surrounding communities. Many of the San Francisco dealers were forced out of business. The Detroit dealers wanted to avoid the same result. (Sellers, CX 3857 at 56-57.)

156. Many salesmen joined the union specifically to achieve shorter work weeks. (Mason Tr. 2166; Carnahan Tr. 2219; deFrancis, CX 3811 at 15.) The ASA rapidly gained adherents. Over 1200 salesmen attended ASA meetings. (CX 3525E.) By early October 1966, 202 petitions had been filed at about 80% of the dealers in the Detroit area. (CX 27; RX 832A.) About 2,000 salesmen became members. (RX 341N.)

a. Multi-Employer Bargaining

157. As had been the case in 1947, 1954 and 1959-1961, the ASA demanded that the dealers form a city-wide multi-employer bargaining unit. (RX 832B.) Multi-employer bargaining was a "constant" demand of the ASA. (Burwell Tr. 2092.) The dealers maintained the same position as they had taken with respect to the previous demands for multi-employer bargaining: it would create powerful union, by increasing its financial resources and by strengthening its bargaining ability. Counsel advised the dealers to refuse multi-employer bargaining. (Burwell Tr. 2093.)

b. Dealer Concessions

158. The Chrysler-Plymouth dealers recognized that uniformity in hours would be the key to avoiding unionization. (Burwell Tr. 2083.)

159. The same strategy was followed by the Ford dealers. (Demmer Tr. 2575- 77.)

160. Less than two weeks after the ASA was formally incorporated, the board of directors of the Chevrolet Association recommended that the Chevrolet dealers close Tuesday evenings, in addition to the three evenings already closed. (CX 306A-B.) At a meeting of the Association, the Chevrolet dealers noted and agreed, and began closing at 6:30 p.m. on Tuesday, July 18, 1966. (CX 307B, CX 309B; Wink Tr. 1622.)

161. The other line groups also closed on Tuesdays at approximately the same time as the Chevrolet dealers. (North Tr. 1455 (Ford); W. Lee Tr. 1859 (Oldsmobile); J. Thompson Tr. 1956 (Chrysler-Plymouth); Roshak Tr. 2462 (Dodge); Armstrong Tr. 3051 (Buick); Dreisbach Tr. 3342 (Cadillac); Melton Tr. 3608 (Volkswagen).)

162. The direct causes of the closing on Tuesday evenings were the demands of salesmen for uniform shorter work weeks and the fear that failure to make that concession would lead to widespread unionization. (Morris, CX 3845 at 56; North Tr. 1455-56; Wink Tr. 1622; J. Thompson Tr. 1956; McIntyre Tr. 2002.)

c. ASA Strikes and Violence

163. During the organization campaign in the summer and fall of 1966, salesmen at several dealerships went out on strike. One of the first strikes was at Frank Chevrolet, formerly Jim Davis Chevrolet. (RX 818, RX 722J, RX 830A.)

164. There was violence associated with the ASA campaign in 1966. Some of the violence was directed at the dealers, as when Wink Chevrolet suffered broken windows and slashed tires. (Wink Tr. 1637; RX 605.) Violence was also directed at strikebreakers. (CX 3525E; RX 762, RX 833B.)

d. Elections

165. A few elections were held in September and October 1966. (RX 24) The NLRB ordered that elections would be held on December 6, 7 and 8, 1966. The election was a success for the ASA. (Stringari Tr. 1540.) Employees voted in favor of the union at 61 dealerships. (RX 834, RX 822.)

166. The ASA continued its organizing activities after the elections in December 1966, and won additional elections in 1967. (Schmid Tr. 1913-14.) The union won 81 elections. (RX 821G.)

e. Contract Negotiations

167. Following the elections in late 1966 and early 1967, the organized dealerships began formal collective bargaining with the ASA. (Schmid Tr. 1924- 25; Babson Tr. 1150-51.)

168. The parties often negotiated the ASA's demand for an end to Saturday work. There also was negotiation of closing on Saturday while extending evening hours. (Burwell Tr. 2098-99; Demmer Tr. 2578-79.)

169. In the first round of negotiations in 1967, the dealers did not accede to the union's demand that the dealers close on Saturdays. (Burwell Tr. 2099.) Nonetheless, numerous contracts were signed in 1967 and 1968. (CX 3604, CX 3605, CX 3606, CX 3608, CX 3609, CX 3610, CX 3612, CX 3613, CX 3614, CX 3615.)

7. Saturday Summer Closings

170. Following the widespread closing of dealerships on Tuesday evenings in 1966, the typical work for salesmen was 60 hours, consisting of two days of work from 9:00 a.m. to 9:00 p.m. and four days of 9:00 a.m. to 6:00 p.m., plus what-

ever time was spent in sales meetings before the dealership opened, and in sales efforts that concluded after normal closing hours. By contrast, the typical work week for other occupations in Detroit and around the country was 40 hours. (Schmid Tr. 1910-11; Rehn Tr. 1191; W. Lee Tr. 1859; McInerney, CX 3835 at 43; Mielnicki, CX 3842 at 50.)

171. The salesmen still were not satisfied with the length of the work week, despite the gains they had made. (Charlebois Tr. 2194; Mason Tr. 2167; Ryan Tr. 2670-71.)

172. Some dealerships attempted to resolve the problem of long work weeks by instituting split shifts, or some other arrangement that shortened the salesmen's work weeks without shortening the hours of operation of the dealership. The salesmen resisted these efforts. (Ritchie Tr. 1306-07; Tennyson Tr. 1828; Carnahan Tr. 2220-21.)

173. The salesmen demanded that all dealers close uniformly on Saturdays. (Thomson Tr. 2032-33; Rehn Tr. 1211; Ritchie Tr. 1309.) The dealers agreed to close. (Schmid Tr. 1911, 1914, 1921; Wink Tr. 1624; Carnahan Tr. 2224, 2228-29.)

174. After the elections in 1966, the ASA began formal negotiation with the dealerships where the union had prevailed. The union typically tried to negotiate a uniform reduction in hours. (Demmer Tr. 2578; North Tr. 1457; Carrick Tr. 2979-81.)

175. Although some negotiations were carried out between the ASA and individual dealers, the ASA still sought a single city-wide contract that would cover all dealers, or secondarily, multiple employer contracts for each of the line groups. (Stringari Tr. 1540-41; Sellers Tr. 2779-80.)

176. The ASA in August 1967 made another attempt to meet with DADA, and DADA again refused to take any action that

could result in its recognition as a multi-employer representative. (RX 31.) The ASA also attempted to negotiate with the line group associations. (RX 724G.) The line groups rejected such group negotiations. (RX 724G.) DADA noted that it was not authorized to negotiate as an multi-employer bargaining representative, and forwarded the petitions to the individual dealers. (RX 33A.)

177. In June 1969, the ASA sponsored a rally to voice opposition to Saturday work. (RX 735.) Three days after the rally, the union demonstrated in front of DADA headquarters, demanding an end to Saturday work. (RX 847; CX 3811 at 33.) The salesmen threatened to picket dealerships that refused to close. (RX 847.)

178. The dealers understood the dangers of multi-employer bargaining and wanted to avoid it, as they had successfully avoided it during the previous union activity. (Schmid Tr. 1924; Ritchie Tr. 1323-25; Roshak Tr. 2464.)

179. The ASA developed a form contract for each line group and attempted to impose that contract on each unionized dealer within the line group. The ASA threatened a strike of salesmen in February 1967. (RX 822, RX 841, RX 723.)

180. While the ASA was threatening its city-wide strike, a new union appeared. The Automotive Technicians Association ("ATA") sought to unionize the back ends, i.e., service department employees. (RX 3310.) The ATA later affiliated with the International Association of Machinists. (RX 836D, RX 3311.) It pledged to support the threatened salesmen's strike. (RX 841.) ATA demanded the end of weekend work for mechanics. (RX 723D.)

181. The International Association of Machinists organized the service departments, and won 23 representation elections by January 1969. (RX 344K, RX 349H, RX 250B.)

182. In February 1967, DADA responded to the ASA threat of a strike by recommending that dealers close on Tuesday evenings, and stay open late only on Mondays and Thursdays. (CX 173; CX 84A-B, CX 41.)

183. ASA demanded a multi-employer contract. The dealers refused multi- employer bargaining. (RX 821C.)

184. Salesmen at 61 dealerships went on strike on March 1, 1967. The strike lasted five days. (RX 836; Carnahan Tr. 2224-25; Bodick Tr. 2305-06; Steiner Tr. 2271-73.)

185. The city-wide strike was followed by personnel changes within the ASA. The leaders of the ASA resigned. (RX 823.) They were replaced by Carl Van Zant. (RX 824.) In October 1967, the ASA became affiliated with the Seafarers International Union of North America ("SIUNA" or "Seafarers"). (RX 725, RX 842; RX 341K.)

186. Other strikes followed the March 1967 city-wide strike. These strikes involved violence, threats of violence, and vandalism. (Mason Tr. 2170-72; CX 3810 at 49.) At Genthe Motor Sales, the two issues that led to the strike were shorter work weeks and minimum commissions. (Genthe, Sr. Tr. 2358.)

187. Ed Schmid Ford underwent a four and a half month strike by its salesmen in 1968. (Schmid Tr. 1915.) The ASA demanded elimination of all Saturday and night work. (Schmid Tr. 1914; CX 3855 at 43-44.) The dealership and the dealer were subjected to vandalism and threats. (Schmid Tr. 1916-17; RX 843.)

188. In February 1968 at Jack Demmer Ford, the salesmen went out on strike for ten and a half months. (Demmer Tr. 2580.) The ASA/Seafarers were found to have committed unfair labor practices during the strike, including threatening nonstrikers with loss of employment and physical harm,

assaulting employees, and threatening customers. (RX 612; RX 2718.)

189. There was a series of ASA strikes at Barnett Pontiac that led the dealer to shorten its hours. Mr. Barnett described the strikes, the threats, the issues and the outcome. CX 3800 at 59-60:

> In approximately 1967 I had a labor strike by an association called the Automobile Association—Automobile Salesmen Association, ASA. They all walked out, picketed and threatened to blow up my house, threatened my children, threatened my wife. This got to a point where they walked out on strike three or four times.
>
> * * * *
>
> That is when they said, "We're not going to work the long hours. We don't want any more salesmen coming in here. We can cover the floor but we do not want to work the 70, 80 hours a week."
>
> I said, "Hey, fellows, if that's what it takes, that's what I'll do."

190. During 1967-1968, there were strikes at Grissom Chevrolet, Berry Pontiac, Hassinger Chevrolet, Flannery Ford, Al Long Ford, Roney Dodge, Clark VW, Pioneer Oldsmobile and other dealerships. (RX 728C, RX 342A, RX 2836, RX 2837.) The strike at Hassinger Chevrolet lasted from January to April 1968. (RX 3321A.) The strike at Berry Pontiac lasted for 22 weeks. (RX 3321B.) There was a two week strike of the salesmen at Westborn Chrysler-Plymouth. (RX 3445E.) Among the issues in these strikes were hours of operation of the dealerships. (RX 728B-C, RX 843.)

191. Many of these strikes in 1967-1968 were violent. At Berry Pontiac windows were broken and a private guard was assaulted. (RX 843.) An ASA officer and three employees were indicted in 1968 for having used force, violence and threats to coerce or intimidate ASA members in 1966. (RX 829.) Carl Van Zant, then the president of the ASA, was convicted of assault and battery. (RX 3321B.)

192. At the strike at Al Long Ford, six rifle bullets were fired through the dealership windows. (RX 611C, RX 844.) A picketer was arrested for throwing rocks. (RX 611C.) Another picketer carried an ax on the picket line. An employee who returned to work and one who worked throughout the strike received 15 to 40 telephone calls threatening them with bodily harm if they continued to work. Customers and deliverymen were threatened if they crossed the picket line. The police assigned full-time police protection to the dealership. The FBI reported a bomb threat. (RX 611D.) The NLRB set aside the election due to the union violence and ordered a new election. (RX 611F.)

193. Most dealerships were now closed on four of the six nights, and the question of shorter work weeks focused on Saturdays. (Causley, CX 3805 at 46; RX 733, RX 730A, RX 731A.) 194. During the 1960s, many dealers began closing their service departments on Saturdays. (Sellers Tr. 2790; Glassman Tr. 2932; R. Thompson Tr. 3227.) When the back ends were closed, the salesmen demanded similar treatment. (R. Thompson Tr. 3228; CX 3800 at 60; McInerney, CX 3835 at 42; Sellers, CX 3857 at 38; Tennyson, CX 3860 at 50.)

195. The amount of business transacted on Saturdays declined through the 1960s, especially in the summer. The salesmen became resentful when they were forced to work on Saturdays. (Sellers Tr. 2790-91; Vyletel Tr. 3848.)

196. The dealers discussed the union problem in their line groups. (Ritchie Tr. 1322-23; Wink Tr. 1627; W. Lee Tr. 1860.) Beginning in 1969, many dealers agreed at association meetings to close their showrooms on Saturdays in the summer. (RX 502B; Burwell Tr. 2099-100; Demmer Tr. 2598-99.)

197. The summer closings were intended to satisfy the salesmen, without going to a permanent five day work week. The closing was an effort to respond to the union pressure. (deFrancis, CX 3811 at 18; Roshak Tr. 2472; CX 3853 at 62.)

198. Despite the decline in business on Saturdays in the summer, most dealers preferred to remain open. They closed because of the pressure from the salesmen. (Roscoe Tr. 1396; Schmid Tr. 1926; J. Thompson Tr. 1957.)

8. Saturday Year-Round Closings

199. During the years the dealerships were closed on Saturdays in the summer, the salesmen remained dissatisfied with the excessive length of the work week for the other nine months of the year. (Mason Tr. 2174; Carnahan Tr. 2229; Charnock Tr. 2702.)

200. By 1973, the salesmen demanded that the dealerships close on Saturdays throughout the year. (Glassman Tr. 2942; Demmer Tr. 2597; Galeana Tr. 2507.)

201. At Greenfield AMC, the salesmen demonstrated their opposition to Saturday work by walking off the job on Saturday. (Kelel Tr. 2723-25.)

202. The salesmen at Mulligan Lincoln-Mercury were members of the union. (RX 366B; Krug, CX 3828 at 65.) They struck for 20 weeks in late 1970. (RX 366B.) One of the issues raised by the salesmen was an end to Saturday work. (CX

3828 at 66.) Shortly after the strike, Mulligan closed on Saturdays. (CX 3828 at 67.)

203. The ASA struck Van Dyke Dodge in early 1971. (RX 376F, RX 1275.) During the strike, a customer and his son were beaten by picketers. (RX 1275C.) The strike was "bitter," and lasted for approximately three months. (RX 3441G.)

204. In addition to the ASA/SIUNA, there were other unions that were active in the late 1960s and early 1970s. In 1970, the UAW became involved in trying to organize the salesmen. (RX 230.) The International Union of Operating Engineers also first appeared, and lost a close election among the service employees at Lochmoor Chrysler-Plymouth. (RX 2845B.) Teamsters Local 376 unionized the office workers at Walt Hickey Ford in the late 1960s. (RX 844.)

205. In 1971, the ASA terminated its affiliation with the Seafarers, and became affiliated with Teamsters Local 212. (CX 3529.) The Teamsters claimed membership of more than 2,000 of the 2,600 salesmen in the Detroit area. (RX 851.) Teamsters Local 212 later merged with Teamsters Local 376, on March 1, 1974. (RX 747.)

206. The Teamsters made uniform Saturday closings the centerpiece of their organizing effort. (RX 3445H-I.) The president of Local 212 was Carl Van Zant. Shortly after the ASA affiliated with the Teamsters, Van Zant wrote to ASA members and spouses. The letter promised: "Our very first act will be, I promise you, to have your husband home on Saturdays. We will have a 5 day week now!" (RX 745) (Emphasis in original.)

207. The Teamsters' demanded for year-round uniform Saturday closing. Ed Schmid Ford had already had the back end unionized by Teamsters Local 376. (Schmid Tr. 1892.) Mr. Schmid recounted a meeting with Eddie Petroff, Sr., the

business agent for Local 376. Schmid Tr. 1911; RX 763; Schmid Tr. 1922-23: "My favorite Teamsters agent brought me in a sticker and put it on my desk and it says: 'Never on Saturday.' And he said, 'Maybe you would like to have this.' And I said, 'Yeah, thanks.' "

208. The union won four of the first five elections after the ASA affiliated with the Teamsters. One of the union's main demands in the collective bargaining negotiations that followed the election was for year-round Saturday closing. (CX 3829 at 26.)

209. The dealers opposed the Teamsters' demand that they close their showrooms on Saturdays. (Burwell Tr. 2103-04.)

210. The Teamsters organizing campaign was carried out with violence and intimidation. One Cadillac dealer testified that shortly before he closed on Saturdays he was approached by two union organizers who "threatened to burn cars, break out showroom windows." (Massey, CX 3839 at 52.)

211. The ASA/Teamsters planned to picket all dealers not under contract with it, on Saturdays beginning April 10, 1971. The union's objective was "to compel Saturday closings year-round." (RX 378A.) 212. Colonial Dodge was picketed by Teamsters Local 212 on three Saturdays in April 1971. There were 20 or 30 picketers. The picketers blocked the entrance to the dealership, and were "making noise, shouting, slamming doors, slamming on the windows." Customers were intimidated from entering the dealership. (Roshak Tr. 2477.)

213. Sullivan Volkswagen was pressured by salesmen to close on Saturday. The dealership was picketed on a Saturday in May or June 1971. The picketers were salesmen at other Volkswagen dealerships. They blocked traffic and yelled at customers, until the police were called and dispersed the demonstrators. The purpose of the demonstration was to

force Sullivan Volkswagen to close on Saturdays. (Sullivan Tr. 500-01.)

214. The salesmen went out on strike at Bob Ford from November 1971 to May 1972. (RX 396E, RX 401B, RX 406C; Somerville Tr. 3723.) One of the major issues was the salesmen's demand for a five day work week. (Somerville Tr. 3724.) The Teamsters vandalized the dealership during the strike. (Somerville Tr. 3754-55.)

215. The Teamsters also struck at Stuart Wilson Ford while the Bob Ford strike was ongoing. (RX 396E, RX 406C.) The demand was for a five day work week. (Somerville Tr. 3727.) The Teamsters engaged in the destruction of property at Stuart Wilson Ford. (Somerville Tr. 3754-55.)

216. During the strike at Stuart Wilson Ford, the teamsters were found to have threatened nonstriking employees with physical harm, assaulted employees, placed nails on the driveway, and physically assaulted customers who attempted to cross the picket line. (RX 619C-D, RX 3403.)

217. The employees at Autobahn Volkswagen went on strike in November 1972. (Carrick Tr. 2982-83.) The strike lasted six months. (RX 410C, RX 3343B.) The unions engaged in intimidation tactics. (Carrick Tr. 2984-89.)

218. The salesmen always coupled the demand for Saturday closing with the demand for uniformity. (Ritchie Tr. 1317; Thomson Tr. 2032; Roscoe Tr. 1404.)

219. In 1970, the year after the ASA demonstrated at DADA to demand Saturday closings, and two years after the salesmen had submitted petitions to DADA, the salesmen again petitioned DADA to get uniform closing on Saturdays. (RX 41A.) Counsel warned that DADA's involvement would inadvertently lead to an obligation to engage in multi-employer bargaining.

(Burwell Tr. 2100-03.) The DADA board of directors decided to cease all involvement in the question of Saturday closings. (RX 42C.)

220. The union made one other effort to force DADA to establish Saturday closings throughout the city in September 1971, when the dealers reopened on Saturdays after having been closed during the summer. The salesmen picketed Charnock Oldsmobile. (Charnock Tr. 2702-03.)

221. The picketers at Charnock Oldsmobile blocked the dealership's entrances and prevented customers from entering the premises. (RX 3333.) During the picketing, the dealership was subjected to vandalism. (Charnock Tr. 2706.)

222. On September 11, 1971, the first Saturday after the summer closing, salesmen refused to work at Fischer Buick, Superior Oldsmobile, Rosedale Motors, Bob Ford, Ted Ewald Chevrolet, Simpson Pontiac, Suburban Oldsmobile, Bob Saks Oldsmobile, Tennyson Chevrolet, North Bros. Ford, and Royal Pontiac. (RX 3331.) Many salesmen who reported to work were threatened and intimidated by Teamsters members. (RX 3331.) Later in September, the salesmen went on strike at Simpson Pontiac, Royal Pontiac and Rosedale Oldsmobile. (RX 3333.)

223. The dealers' response to the demands for Saturday closing was affected by their knowledge of what happened to the dealers that resisted union demands. (W. Lee Tr. 1867; McIntyre Tr. 2005-06; Schmid Tr. 1918-19; Demmer Tr. 2598; Kelel Tr. 2728-29.)

224. David Somerville was employed as a salesman at Bob Ford. The main issue that led the salesmen to join the Teamsters was the demand for a five-day work week. (Somerville Tr. 3719.) The union negotiated with Bob Ford for five or six months, but were unable to reach agreement. (Somer-

ville Tr. 3724.) The salesmen went out on strike from November 22, 1971 until April 1972. (Somerville Tr. 3723.)

225. At the beginning of the strike, the picketers were successful in preventing the delivery of new cars to Bob Ford. The car haulers were unionized by the Teamsters, and they would not cross the picket line to deliver cars. (Somerville Tr. 3746-47.)

226. The Teamsters resorted to vandalism to pressure Bob Ford. (Somerville Tr. 3750.) They broke windows, spread nails on the driveway to puncture tires, and scratched customers' cars if they crossed picket lines. They poured acid on new cars, and put super glue in the locks of the cars and the dealership. (Somerville Tr. 3768-71.)

227. The Teamsters began to vandalize other Ford dealers. They destroyed the windows on the whole side of the showroom of Pat Milliken Ford. (Somerville Tr. 3754.) They broke windows at Ray Whitfield Ford. (Somerville Tr. 3768.)

228. The dealers relied on their strike funds to assist the victims of strikes. Distributions were made by the Ford fund to struck dealers, including Bob Ford, Smith Briggs Ford, Al Steiner Ford and Al Long Ford, each of which received from $12,000 to $30,000. (RX 338A.)

229. The Teamsters tried to achieve Saturday closings through formal collective bargaining at dealers where the salesmen were represented by the union. One way the Teamsters precluded the dealers from extending their hours was by negotiating a maintenance of standards provision. (Burwell Tr. 2113- 23.)

230. A maintenance of standards provision requires the employer to maintain wages, hours and working conditions at the highest minimum standards in effect at the time of the

agreement. (Burwell Tr. 2115.) The provision precluded the dealer from extending his hours of operation except for special sales promotions. (Burwell Tr. 2121.)

231. The dealers opposed maintenance of standards provision but were often forced to accept it as part of the negotiated contract. (Burwell Tr. 2123, 2127.)

232. The union demands were discussed at the line group meetings. (Murphy, CX 3846 at 40-41; RX 3441K.) The discussions at the line groups involved the question whether the dealers could achieve labor peace by making additional concessions, and if so, which concession should be made. (Schmid Tr. 1923; Roshak Tr. 2480-81; Duncan Tr. 2424-25.)

233. The problems were also discussed at DADA meetings, until counsel for some of the line groups objected that such discussions might lead to an involuntary multi-employer bargaining obligation. (Ritchie Tr. 1352-53; Genthe, Sr. Tr. 2393; Charnock Tr. 2705-06.)

234. One factor in 1972 for year-round closings on Saturday was that business transacted on Saturday was declining. (Mielnicki, CX 3842 at 56; Norris, CX 3847 at 48-50; Rehn Tr. 1216-18.) It was a good sales day only in the fall when new models were introduced. (CX 3866 at 32.)

235. Some dealers attempted to resolve their salesmen's demand without closing on Saturdays. William Ritchie tried shortening the Saturday hours at Crest Lincoln-Mercury. (Ritchie Tr. 1308.) Mr. North suggested to his salesmen that they close on Monday or Tuesday instead of Saturday. (North Tr. 1437.) Buff Whelan also tried to convince his salesmen to close on Monday instead of Saturday. (CX 3866 at 36.) None of these solutions was acceptable to the salesmen. (Id.)

236. Some dealers tried unsuccessfully to resolve their

salesmen's complaints about the hours by splitting shifts to give the salesmen some time off. (Levy Tr. 3909-12; Dittrich Tr. 3189-90.)

237. Split shifts involve hiring more salesmen. Hiring more salesmen is opposed because, like split shifts, it divides the same total commissions among more salesmen. (Levy Tr. 3912; RX 739.)

238. The dealers felt that the only way to end union strife was to grant the salesmen what they had demanded: uniform year-round Saturday closings. (Ritchie Tr. 1316-17, 1366; Roscoe Tr. 1398; Roshak Tr. 2480; Thibodeau Tr. 2537; Duncan Tr. 2425.)

239. In some dealerships in 1972, salesmen refused to show up on Saturdays. The sales employees or their union representatives told the dealers they did not want to work on Saturday. The dealers ultimately agreed. (Tennyson Tr. 1814-17; Sellers Tr. 2797-99; Wink Tr. 1626.) Four days after Al Dittrich took over Crestwood Dodge, in October 1973, he and one of his sales employees, the Teamsters Steward Nicola Shelly, had a conversation. She said: "You know we're going to close Saturdays in a few weeks." He said: "We are?" And she said, "Yes, we are." Mr. Dittrich closed on Saturdays. (Dittrich Tr. 3165-66, 3177.)

240. Faced with the union demands for a uniform five day work week, the threat of violent strikes and diminishing sales on Saturday, the dealers began closing on Saturdays year-round in December 1973. (CX 3346 through CX 3359; Moran, CX 3844 at 27-28, 32-33; Murphy, CX 3846 at 51.)

241. The primary factor leading to the dealers' decision to close was the demands of the salesmen. (deFrancis, CX 3811 at 18; Whitfield, CX 3867 at 48.) The closing was an effort to satisfy the salesmen and settle their grievances so they

would not desire to unionize to achieve their goals. (Whitfield, CX 3867 at 47-48.)

242. When most dealerships closed on Saturdays year-round in December 1973, the salesmen had achieved what they had been demanding for nearly 20 years—a uniform five-day work week. The salesmen were satisfied. (Rehn Tr. 1215-16; Bretzlaff Tr. 1277; Roscoe Tr. 1399.) For those dealers that closed, the result was a period of labor peace that has, with some exceptions, lasted to the present. (Armstrong Tr. 3062; Dreisbach Tr. 3351-52.)

243. The Teamsters obtained a maintenance of standards provision at Thompson Chrysler-Plymouth, Inc. in 1973. (Somerville Tr. 3742.) Teamsters Local 387 continued to demand more explicit language banning Saturday hours during collective bargaining negotiations in 1977, 1979 and 1982. (R. Thompson Tr. 3241, 3249, 3251; Bell Tr. 3135.)

244. "Consistent Past Practice" is a rule of labor agreement construction whereby the parties can modify the terms of the collective bargaining agreement by engaging, and acquiescing, in conduct without modifying the agreement in writing. (Burwell Tr. 2129-30.) Genthe Chevrolet, Inc. and Teamsters Local 376 have an understanding that the dealership will be closed on Saturdays and on weekday evenings, other than Mondays and Thursdays, which has become part of the collective bargaining agreement as a result of the dealership's past practice. (Genthe, Jr. Tr. 3319-20.) During the past seven years, Genthe Chevrolet has sought the union's consent to conduct special Saturday sales approximately twice a year. The union has refused to permit the sales employees to participate in roughly half of the special Saturday sales sought by the dealership. (Genthe, Jr. Tr. 3319.)

9. Enforcement of Saturday Closings

245. As had occurred numerous times from 1947 through the Saturday closings in 1973, dealerships that were picketed after 1973 often were subject to threats, violence and vandalism. As one Teamsters officials explained, "Those were things that just happened. It was part of the game." (Somerville Tr. 3772.)

246. One of the first dealers that was picketed for remaining open on Saturdays was Bill Brown Ford in 1974. The picketing was organized by the Teamsters. (Bell Tr. 3137; Somerville Tr. 3752.) There were typically from 200 to 400 picketers. His employees were harassed at home. (CX 3802 at 35- 37.)

247. Robert Whelan, the dealer at Buff Whelan Chevrolet, disagreed with the other Chevrolet dealerships about the necessity of closing on Saturdays. When the others closed, he remained open. (CX 3866 at 31-32.) "Salesmen from other places" vandalized his cars. (CX 3866 at 32.) He closed. A few years later, he tried to reopen on Saturdays, and again salesmen vandalized his cars. (CX 3866 at 32.) In 1979, he tried to open for a special sale and again had problems. (CX 3866 at 32.)

248. Ray Whitfield's decision to close on Saturdays was made after his salesmen picketed, along with union members and salesmen from other dealers. (CX 3867 at 45, 55.) Some of his cars were vandalized. Windows at the dealership were shot out on consecutive Saturdays. His wife and daughter-in-law received threatening telephone calls at home. (CX 3867 at 45.)

249. Glassman Oldsmobile was also picketed in early 1974. The dealership had closed on Saturdays in 1973, but reopened for a one-time Saturday sale in May 1974. Mr. Glassman

informed his salesmen of the upcoming sale on Monday. By the time Mr. Glassman got home Monday evening, his wife had already received telephone calls "threatening her life, my children and my own." (Glassman Tr. 2943-45.)

250. When Glassman Oldsmobile opened on Saturday, the dealership was guarded by two police squad cars and six private security guards. (Glassman Tr. 2947.) There were about 300 salesmen picketing. The picketers carried signs that stated "Never on Saturday." During the picketing, there was damage to the dealership and intimidation of the employees. (Glassman Tr. 2948-54.)

251. The Glassman picketing was organized by the Teamsters. (Somerville Tr. 3752.) Glassman Oldsmobile has remained closed on Saturdays. (Glassman Tr. 2949.)

252. Key Oldsmobile tried to stay open longer hours in 1974. (CX 3826 at 18.) The dealer, Leo Jerome, was subjected to "harassment, telephone calls, threats, mail, obscene phone calls." (CX 3826 at 19.) In 1974, the dealer restricted his extended hours to evenings and did not then attempt to open on Saturdays. (CX 3826 at 55.)

253. Mr. Jerome's efforts to open longer hours continued until early 1983. He finally gave up after one incident in which 300 salesmen came to his dealership and "totally destroyed" it. CX 3826 at 59:

> Every car in the lot was—I mean totally debased, broken windows, burned— headlights kicked out, tail lights kicked out, holes in the sheet metal. . . . Just destroyed, 160 cars, something like that. Every car I had was unsellable.

254. In early 1975, Claborn AMC was forced to shorten its hours after picketing. (RX 854.) Harold Claborn announced in

December 1974 that he would open on Saturdays, after which he was "plagued with threatening phone calls. He was picketed by about 200 salesmen, some of whom carried signs stating "Saturday is for the kids." One of Claborn's showroom windows was shattered, after which he capitulated and closed. (CX 3535.)

255. Coons Bros. closed on Saturdays in early 1974 after being pressured by salesmen. (RX 854.) However, it remained open in the evenings. Coons Bros. was picketed and forced to close three evenings because of threats. (RX 854; Bell Tr. 3137.)

256. In 1975 or 1976, Bob Saks Oldsmobile stayed open on Saturday, and was picketed. Some of the picketers at Saks Oldsmobile "keyed"[6] cars and scattered nails and tacks on the driveway. (Bodick Tr. 2316.)

257. In 1977, Jack Cauley Chevrolet was also picketed for opening on Saturday. (CX 3804 at 94.) Many of the dealers' cars were damaged by the picketers. (CX 3804 at 90-92.)

258. In 1978 or 1979, Rowan Oldsmobile attempted to open on Saturday at new car announcement time. A number of cars suffered scratches and broken windshields. (Rowan, CX 3854 at 74.) The dealer closed on Saturdays. (CX 3854 at 75-77.)

259. In February 1979, Buff Whelan Chevrolet planned an invitation-only sale on a Saturday. (Muir Tr. 3398-99.) When the dealership opened on Saturday, it was picketed again by about 100 to 150 picketers. The picketers were salesmen at other dealerships. They tried to intimidate the customers who came to the sale. A number of used cars on the lot were vandalized. The police were called, and arrests were made. (Muir Tr. 3403-05.)

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[6] "Keying" a car refers to the practice of scratching the paint on a car with a set of keys or other sharp object. (Costentino Tr. 3074-76.)

260. A group of salesmen became concerned that more dealers might be planning to open. They also were concerned about potential liability for damages resulting from demonstrations. They therefore had a lawyer create for them the Professional Automobile Salesmen of Michigan, Inc. ("PASM"). (Bufalino Tr. 3686-87.) About 850 salesmen joined PASM. (CX 3936A.) The PASM was an association of salesmen, but it was not a union. (Bufalino Tr. 3696.) The members had no interest in negotiating contracts or in making any changes in working conditions. They sought only to convince dealers to remain closed on Saturdays and three evenings during the week. (Bufalino Tr. 3694.)

261. The PASM picketed Sullivan Volkswagen on Saturday, March 24, 1979. (CX 3536A.) There were 250 picketers, some of whom threw nails on the driveway and rocks through windows, and vandalized cars. (CX 3536A-B; Sullivan, Sr. Tr. 505.) Fifteen cars were damaged. (CX 3536A.) The picketing resumed the following Saturday, but the picketers were dispersed by police with dogs. (Sullivan, Sr. Tr. 506.) Several arrests were made. (Bufalino Tr. 3691.)

262. On the same day that Sullivan Volkswagen was picketed, the PASM also picketed Brian Luman Volkswagen. The picketing was for the same reason—Luman was open on Saturday. Lurnan Volkswagen thereafter "closed Saturdays to avoid union trouble." (CX 3536.) The PASM also picketed at Key Oldsmobile. There were about 75 picketers, and the dealership was vandalized. (Bufalino Tr. 3698.)

263. About 1979, Mike Dorian Ford opened on a Saturday. (CX 3817 at 29-30.) There were about 150 to 200 picketers to keep Saturdays closed. (CX 3817 at 34.) After an hour or two of being picketed, the dealership closed. (CX 3817 at 29-32.)

264. Mel Farr tried to extend the hours at Mel Farr Ford in 1981 by staying open to midnight on Fridays and all day on Saturdays. (Farr Tr. 438.) Fifty to seventy-five of his cars were vandalized one night. Mr. Farr was also run off the road, was subjected to harassment, and received some threatening telephone calls. (Farr Tr. 441-42.) His children also were threatened. (Farr Tr. 459.) He resumed his normal hours. (Farr Tr. 440.)

265. In the spring of 1981, Skalnek Ford reopened on Saturdays. The salesmen at the dealership opposed the opening. (Skalnek Tr. 2919.) After two or three weeks, the salesmen stopped coming to work on Saturdays. The customers never showed up, and after 10 weeks with no sales or salesmen, the dealership gave up and closed on Saturdays. (Skalnek Tr. 2921-22.)

266. In 1981, Dreisbach Buick decided to open on Saturday. The following Monday, the rear windows on 12 to 15 cars had been smashed. The dealer opened again the next Saturday, and had three cars vandalized with paint. Following the second incident, the dealership remained closed on Saturdays. (Dreisbach, CX 3814 at 41-42.)

267. Taylor AMC reopened on Saturdays after 1976. The Teamsters picketed and forced the dealership to close in October 1982. (Bell Tr. 3137; RX 450C.)

268. Bob Saks Oldsmobile was picketed about 1982 or 1983 when it tried to extend its hours. (Cauley, CX 3804 at 93-94.) The dealership was harassed. (CX 3804 at 94.)

269. Falvey Toyota tried to extend its hours in 1983. It decided to open in the evenings. The dealership was picketed. The picketers were "blocking customers from coming in, shouting obscenities and making threats. The police were

called. The picketers were salesmen at competing dealerships. (Fuller Tr. 353-56.)

270. In October 1983, Taylor AMC made a renewed effort to extend its evening hours. It was picketed by salesmen from other dealerships, who sought to force Taylor to resume its shorter hours. (CX 3538; Bell Tr. 3137.) Taylor is now open late only on Monday and Thursday evenings. (JX 2S.)

271. In October 1984, an American Motors dealership, Tel-Twelve AMC, opened on Saturdays. It was repeatedly picketed and vandalized. (CX 3539.) There were 200 salesmen picketing Tel-Twelve AMC. (CX 3513.) A rock was thrown through a window. Cars were damaged. Picketers also physically impeded customers from entering the dealership, put tacks in the driveway and scratched a customer's car. (Cini Tr. 583-86.) The salesmen did not want to work Saturdays. (CX 3541.)

272. The managers of Tel-Twelve AMC also owned Southfield Dodge. The sales people increased the pressure on Tel-Twelve by vandalizing Southfield Dodge. (CX 3540, CX 3541.)

273. In 1981, Joseph Cosentino began working as a salesman at Patrick Oldsmobile. He began going to the dealership on Saturdays for four or five hours in order to contact his prior customers to let them know he was working at a new dealership. He began to get threats. Some were to injure him personally, and some were to damage cars at the dealership. The threat to cause damage was carried out. He stopped his Saturday work. (Cosentino Tr. 367-76.)

274. When Walt Lazar Chevrolet opened for a sale on a Saturday, the dealership received a bomb threat. (Cole, CX 3808 at 15; Lazar, CX 3831 at 21.) When Bill Greig Buick opened on a Saturday in June 1984, "the union called me ...

and threatened if I opened that they would bust my windows and do a few things to make me regret it. . .'' (CX 3822 at 39, CX 3541.) Mr. Greig was aware that two weeks earlier, the union did $8,000 damage to Royal Oak Ford when it tried to open on Saturday. (CX 3822 at 40.)

275. Murphy Chevrolet also attempted to open for a special sale in 1979. It was picketed by 20 picketers, and tacks were strewn on the driveway to damage tires. (Murphy, CX 3846 at 45.)

276. The Lincoln-Mercury district sales manager for Detroit suggested that the dealers open on a Saturday in the early 1980s as part of a special promotion connected with a customer rebate program. (Gibbs Tr. 641.) One dealer received a telephone call. The anonymous caller said: ''We have been successful in having the dealers close their places on Saturday. We want to keep it that way. ... We know your daughter is a student at the University of Detroit and we know what route you take to work each day.'' (Gibbs Tr. 642.)

277. The dealers' uniform year-round closing stopped the Teamsters organization activity in the early 1970s. By conceding to the salesmen on the question of the five-day work week, the dealers preempted the only issue able to attract many salesmen to the union. (Somerville Tr. 3744.)

278. The Teamsters have made numerous efforts to organize dealerships since the 1973 closings. In the first year or two after the dealerships closed, the Teamsters organized the salesmen at about four dealerships and the mechanics at about six. (Somerville Tr. 3759.)

279. At Genthe Chevrolet, unions made repeated efforts to unionize the employees. The ASA tried to unionize the salesmen in 1968, and were defeated. (Genthe, Sr. Tr. 2368.) The Teamsters tried to organize the salesmen in 1971. Again

the union lost. (Genthe, Sr. Tr. 2378.) Also in 1971, the Teamsters tried and failed to organize the back end. (Genthe, Sr. Tr. 2381-82.) In 1974, the Teamsters again tried unsuccessfully to unionize the salesmen. (Genthe, Sr. Tr. 2395-96.) The Teamsters again tried to unionize the front end in 1978. (RX 2857.) This time, the Teamsters finally prevailed. (Genthe, Sr. Tr. 2385.) Two nearby Chevrolet dealers began reducing their commissions to a flat rate on several well-selling cars. Although Mr. Genthe had not reduced his commissions, the fear that he would do so led the salesmen to vote in the Teamsters. (CX 3819 at 39-40.)

280. The leadership of the Teamsters changed in late 1981. Following the change, the Teamsters initiated a campaign to organize the salesmen in the Detroit area. (RX 751, RX 433, RX 434.)

281. One of the dealerships that the Teamsters tried to organize in or around 1981 was Buff Whelan Chevrolet. Although the dealership was already closed on Saturday, the salesmen knew that the dealer wanted to be open on Saturdays. The fear that the dealer would reopen was exploited by the Teamsters in an effort to unionize the salesmen. (CX 3866 at 54.)

282. The Teamsters more recently tried to organize salesmen for the specific purpose of maintaining Saturday closings. The Teamsters held several meetings in January 1985. The first meeting was attended by at least 300 or 400 salesmen. (Thomson Tr. 2048; deFrancis, CX 3811 at 28.) The salesmen asked a number of questions, mostly involving the threat of reopening on Saturdays. (Thomson Tr. 2049.)

283. Following the meetings, a number of election petitions were filed. The overriding issue was the salesmen's "fear the

FTC will try to force them to work longer hours." (RX 863; Ritchie Tr. 1355; Wink Tr. 1627; Schmid Tr. 1932; Stewart Tr. 3458-59.)

284. If dealers in Detroit were required to open on Saturdays, they would join a union and strike. (Carnahan Tr. 2238-39; Colombo Tr. 1719; Stringari Tr. 1551.)

F. Dealers Closed to Meet Salesmen's Demands

285. Most dealers opposed the reductions in their hours and remained open until forced to close by strikes, threats and destruction of property, and being advised by their counsel that their best chance for avoiding labor unrest would be to shorten showroom hours uniformly. (F. 89, 144, 241.)

286. There were numerous discussions among salesmen and dealers which led to the shortening of hours since 1959. The evidence was undisputed that all of these discussions from the 1950s to the present were initiated by the salesmen. (Ryan Tr. 2660; Dreisbach Tr. 3351.)

287. The primary motive for the dealers closing in the evenings and on Saturdays was to meet the demands and pressure of the salesmen. (North Tr. 1439; McIntyre Tr. 1993-2004; Wink Tr. 1620.)

G. The Hours Restraint Was Part of Some Collective Bargaining Agreements

1. Thompson Chrysler-Plymouth, Inc., Joseph P. Thompson and Westborn Chrysler-Plymouth, Inc.

288. The hours restraint was part of a series of formal collective bargaining agreements covering Thompson's and Westborn's sales employees from 1973-1983. In each instance, the language of the restraint—a maintenance of standards

provision—was identical. (RX 1006T, RX 1011Z-AA, RX 1013Z-AA; RX 1030Y; RX 1053Z-AA.) The maintenance of standards clause effectively precluded Thompson and Westborn from extending their showroom hours.

289. The restraint also was the product of bona fide arms-length bargaining. The maintenance of standards provisions represented a compromise from each side's positions. (Somerville Tr. 3740; Burwell Tr. 2118-19.)

2. Suburban Motors Company, Inc.

290. On August 12, 1968, Suburban Motors Company, Inc. ("Suburban"), an Oldsmobile dealership, and the ASA entered into a three-year collective bargaining agreement (the second collective bargaining agreement between Suburban and the ASA) effective through August 31, 1971. (RX 2991A-Z-17.) The agreement included the dealer's hours of operation. (RX 2991A-Z-28.)

291. On September 2, 1971, Suburban and Teamsters Local 212, the ASA's successor, entered into a third collective bargaining agreement, which was in effect until March 23, 1973. (RX 2993B, RX 3344A.) The 1971 agreement contained the following maintenance of standards provision. RX 2993B:

> The employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

The agreement precluded Suburban from extending its hours of operation without the union's consent.

3. Fischer Buick-Subaru, Inc. and Carl E. Fischer

292. From November 1, 1968 until May 1972, Fischer BuickSubaru, Inc. ("Fischer") sales employees were represented first by the ASA and then by its successors, Teamsters Local 212.

293. On November 9, 1971, Fischer and Teamsters Local 212 entered into a second collective bargaining agreement covering the dealership's sales employees. (CX 3625A-C.) The agreement contained a maintenance of standards provision identical to that contained in the September 2, 1971 Suburban collective bargaining agreement.

4. Crestwood Dodge, Inc.

294. From 1967 until July 1974, Crestwood Dodge, Inc.'s ("Crestwood") sales employees were represented first by the ASA and then its successors, Teamsters Local 212 and Teamsters Local 376. (RX 341G; Dittrich Tr. 3182.) 295. During 1970-1971, George Beals, Crestwood's dealer/operator at the time, and the ASA-SIUNA negotiated a new collective bargaining agreement for a three- year term. (RX 3442H-I.) The dealership's hours of operation were specifically set forth in the agreement. (RX 3442H.)

5. Dick Genthe Chevrolet, Inc. and Richard Genthe, Sr.

296. Teamsters Local 376 has represented Dick Genthe Chevrolet, Inc.'s ("Genthe") sales employees since February 13, 1979. As a result of past practice, Genthe and Teamsters Local 376 have an unwritten understanding that the dealership will be closed on Saturdays and on weekday evenings other than Mondays and Thursdays, which has become part

of the dealership's collective bargaining agreement. (Genthe Tr. 3319-20.)

297. "Consistent Past Practice" is a rule of labor agreement construction, whereby the parties can modify the terms of the written collective bargaining agreement. (Burwell Tr. 2129-30.)

6. Tennyson Chevrolet, Inc. and Harry Tennyson

298. Tennyson Chevrolet, Inc. ("Tennyson") and Harry Tennyson have a long history of negotiating the terms and conditions of employment with the dealership's sales employees, irrespective of whether such sales employees were represented by a union. (Tennyson 1793-1801.)

299. In 1960, Tennyson and its sales employees—without formal representation by any union—negotiated the sales employees' terms and conditions of employment, including the dealership's hours of operations. (Tennyson Tr. 1973.) The sales employees submitted a written contract proposal. (RX 2915A- B; Tennyson Tr. 1795.) After modification of the sales employees' request, the dealership agreed in writing to close at 6:30 p.m. on Wednesday and Saturday evenings, and agreed to provide certain other benefits. (RX 2914A-H; Tennyson Tr. 1799.)

H. Competitive Effect of Closings

300. There was no evidence that the Saturday closings caused an increase in retail prices of cars sold in the Detroit area. (Klein Tr. 836.)

301. The showroom hours reductions did not cause an increase in gross margins as a percentage of sales of car dealers in the Detroit area. (Klein Tr. 840, 910.)

III. LEGAL DISCUSSION

The antitrust laws were enacted to foster competition in the marketplace. The labor laws permit the elimination of competition over wages, hours and working conditions. These two policies sometimes conflict. In order to resolve this conflict, Congress and the courts developed a "broad labor exemption from the antitrust laws"[7] for concerted activities arising from a labor dispute. If the activity is motivated by a concern with working conditions and if the primary effect of the activity is in the labor market, the exemption applies even though it restrains trade. *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). In Jewel Tea, the butchers' demand for an end to evening business hours in Chicago led to a collective bargaining agreement closing all meat departments at 6:00 p.m. Despite the alleged effect on competition among retailers and despite the inconvenience to consumers, the Supreme Court exempted the concerted conduct of employers and workers from the antitrust laws.

A. *Development of Federal Labor Policies*

In the early twentieth century, employers used the Sherman Act as a weapon to prevent union action. Strikes or picketing were held to violate the Sherman Act. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

In 1914, Congress in the Clayton Act limited injunctive relief in a labor dispute. 29 U.S.C. § 52. When the Court refused to exempt union activity in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), Justice Brandeis' dissent shaped current labor policies.[8]

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[7] *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983).

[8] "Mr. Justice Brandeis' dissent in Duplex has . . . carried the day in the courts of history as evidenced by [the Norris-LaGuardia Act of 1932 and decisions of this Court]." *Jewel Tea* 381 U.S. at 703 (Justice Goldberg, concurring).

Justice Brandeis would have found that a strike to obtain uniformity of working conditions is a valid exercise of a union's legitimate self-interest. 254 U.S. at 480-81. He further would have decided that the relationship between employers and workingmen is a struggle which will necessarily result in some incidental injuries to the public. These resulting injuries should not be judged under antitrust laws. 254 U.S. at 486-88. Where the "industrial combatants" are acting in their legitimate self-interest, Justice Brandeis concluded, courts should not interfere on the basis that the resolution of such conflict endangers other community interests, *e.g.*, the antitrust laws. 254 U.S. at 488.

The Norris-LaGuardia Act of 1932 expanded the statutory exemption. 29 U.S.C. §§ 101-115. The statute prohibited courts from issuing injunctions (except in conformity with the labor laws) "in a case involving or growing out of a labor dispute." It also prohibited injunctions "contrary to the public policy declared in this chapter." 29 U.S.C. § 101. The public policy was stated explicitly. The ultimate goal is "to obtain acceptable terms and conditions of employment." To obtain this goal, the workers are guaranteed the right to engage in concerted activity "for the purpose of collective bargaining or other mutual aid or protection,"[9] but a worker also "should be free to decline to associate with his fellows." 29 U.S.C. § 102.

The Act defined labor dispute to include "any controversy concerning terms or conditions of employment ... regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c). A person interested in a labor dispute includes both employers and

[9]The phrase "other mutual aid or protection" is significant. The labor laws protect non-unionized employees who engage in concerted activity apart from collective bargaining. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

employees. 29 U.S.C. § 113(b). And the law defines when a case involves or grows out of a labor dispute. 29 U.S.C. §113(a):

> . . . [W]hen the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers. . . .

The Norris-LaGuardia Act thus makes several points clear. Courts should not interfere with labor disputes except to further the policies of the labor laws. The overriding policy of the labor laws is to achieve better working conditions, and to obtain such conditions employees may choose to unionize or not to unionize. The law protects employees in their decision to obtain improvements in working conditions through collective action or individually. Collective action is not limited to collective bargaining, but includes a broad range of "mutual aid." Finally, the section quoted above demonstrates that employers and associations of employers are parties to labor disputes, with the same protection as employees.[10]

In *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), workers at a stocking manufacturer engaged in a sit-down strike, acts of violence and vandalism. 310 U.S. at 481-82. The Court ruled

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[10]An English statute in 1825 legalized agreements between employers fixing wages. Oppenheim, Cases on Federal Anti-Trust Laws, p. 51 (1st ed. 1948).

that, although the union's activities were unlawful and "reprehensible," they did not violate the antitrust laws. 310 U.S. at 483-84.

The sit-down strike affected competition. The plant was forcibly closed, and the strikers blocked the shipment of finished inventory. The union sought to eliminate competition based on different labor standards. This elimination of competition, however, was viewed as legitimate employee self-interest. 310 U.S. at 503. The activity in *Apex Hosiery* was by a non-unionized sales force. At the time of the sit-down strike, only eight of the firm's 2,500 employees were union members. 310 U.S. at 514. The union's activities did not violate the antitrust laws. The action arose as a result of a labor dispute, and its underlying purpose was to restrict competition in the labor market, not in the sale of stockings. 310 U.S. at 501-02.

Shortly after *Apex Hosiery*, the Court decided *United States v. Hutcheson*, 312 U.S. 219 (1941). The case concerned a boycott that arose from a dispute between two unions over the right to perform certain jobs for Anheuser-Busch. 312 U.S. at 227-38. The Court held the boycott exempt from the antitrust laws so long as a union acts in its self-interest and not in combination with non-labor groups, the Court stated that the exemption does not depend upon "any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 312 U.S. at 232. The fact that the union believed the action was in its selfinterest was sufficient.

The Court recognized the limits to the statutory exemption in *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797 (1945). The union agreed with manufacturers of electrical equipment in

New York City to prevent the sale in New York of electrical equipment manufactured elsewhere. An excluded manufacturer brought suit against the union. The Court denied the statutory exemption, holding that the union aided and abetted a conspiracy by the manufacturers to control prices, and thus was not entitled to the protection of the exemption. 325 U.S. at 809-10. The employees sought to achieve improved working conditions indirectly, by limiting business competition in the expectation that higher profitability by their employers would ultimately result in higher wages. 325 U.S. at 799-800.[11]

The importance of whose interests are primarily being served was also determinative in *United States v. Women's Sportwear Manufacturers Association*, 336 U.S. 460 (1949). A group of competitors engaged in concerted activity to allocate business and control prices. The activity did not result from a labor dispute. Based on the circumstances of the industry and in the light of the origin of the agreement, the Court found that its intent and effect was to restrict competition and to control prices and markets. 336 U.S. at 463. Along with the division of markets and price fixing, the agreement allocated among contractors and jobbers the requirement to pay unemployment compensation insurance and to contribute to the health and vacation fund for the contractors' employees. *United States v. Women's Sportswear Manufacturers Association*, 75 F.Supp. 112, 115-16 (D.Mass.1947). The conspirators argued that including labor-related provisions in a price fixing agreement immunized the agreement. In rejecting this argument, the Court ruled that incidental benefits to labor cannot

[11]The question of whose interests are primarily served, based on the goals and effect of the agreement, has guided the statutory and nonstatutory exemptions to the present. *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 625 (1975).

immunize an agreement that primarily and directly restrains competition. 336 U.S. at 464 ("... [B]enefits to organized labor cannot be utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires.") This is the reverse of *Allen Bradley*. Just as workers cannot indirectly achieve improved working conditions by restraining business competition, competitors cannot exempt a price fixing conspiracy by pointing to benefits to their workers.

B. *Jewel Tea*

The leading case on the nonstatutory labor exemption[12] is *Amalgamated Meat Cutters v. Jewel Tea*, 381 U.S. 676 (1965).[13]

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[12]The nonstatutory labor exemption, used to judge a combination between a labor and a non-labor group, was defined by the Court in *Connell Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975).

> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competiton based on differences in wages and working conditions. *See Mine Workers v. Pennington, [381 U.S.] at 666, Jewel Tea*, [381 U.S.] at 692-693 (opinion of White, J.)

[13]The history of the case is in *Jewel Tea Co. v. Local Unions, Amalgamated Meat Cutters & Butcher Workmen*, 274 F.2d 217 (7th Cir.). *cert. denied*, 362 U.S. 936 (1960) (hereinafter *Jewel Tea v. Local Unions I*); *Jewel Tea Co. v. Local Unions, Amalgamated Meat Cutters & Butcher Workmen*, 215 F. Supp. 837 (N.D. Ill. 1962) (hereinafter *Jewel Tea v. Local Unions II*) *Jewel Tea Co. v. Local Unions, Amalgamated meat Cutters & Butchers Workmen*, 215 F. Supp 839 (N.D. Ill. 1963) (hereinafter *Jewel Tea v. Local Unions III*); and *Jewel Tea Co. v. Associated Food Retailers of Greater Chicago, Inc.*, 331 F.2d 547 (7th Cir. 1964) (hereinafter *Jewel Tea v. Associated Retailers*).

There, 9,000 retail food stores in the Chicago area had total sales of $5 billion. Jewel Tea operated 196 food stores in the area. It sought to sell self-service meat in the evenings. However, an agreement between the Meat Cutters Union and several thousand food retailers represented by the food retailers association prohibited sales of meat after 6:00 p.m. Jewel Tea sued the union and the association under the antitrust laws. *Jewel Tea v. Local Unions I*, 274 F.2d 210, 220; *Jewel Tea*, 381 U.S. at 682-84.

The butchers in Chicago had been concerned with the length of their work week for many years. In 1919, they struck in opposition to an 81 hour, seven day work week. At the time of the suit, the hours were 9:00 a.m. to 6:00 p.m. six days a week (54 hours). *Jewel Tea v. Local Unions III*, 215 F.Supp. at 841-42.

The majority of the butchers opposed night work, but 28 voted for night work in a mail ballot. 215 F.Supp. at 844. The employers "meet in advance of negotiations to explore their objectives, and caucus periodically to determine their bargaining position." 215 F.Supp. at 842. The union opposed night work, and the employers ultimately agreed. The collective bargaining agreement provided that the union would not enter into a contract with any other employer designating lower wages, longer hours or any more favorable conditions of employment. 215 F.Supp. at 842.

During negotiations, Jewel Tea offered a proposal that would allow it to remain open in the evening without butchers on duty. 215 F.Supp. at 846. The district court found, however, that this proposal would increase the butchers' work load during the day, or shift their jobs to other employees, or force them to work in the evening. 215 F.Supp. at 846.

The district court was convinced that the employees sought

the elimination of night marketing to further their own interests, and not "as a tool of the employer group" or at their behest. 215 F.Supp. at 846. Nonetheless, there were competitive benefits for the grocers. By closing in unison, the food markets were able to cut their operating costs without risking the loss of business to more aggressive competitors like Jewel Tea. *Jewel Tea v. Local Unions I*, 274 F.2d at 222.

Jewel Tea is remarkably similar to this case. It involved a labor dispute over the length of the work week. Employees were working far longer hours than normal. The employees believed that shortening their hours of work without shortening the employer's hours of operation would adversely affect their employment. The employees demanded that all employers abide by uniform hours of operation. The employers resisted the employees' demands for shorter hours, and in the face of actual and threatened strikes gave in gradually. Some employees were willing to work the longer hours, and some employers preferred to extend their hours. Some markets profited from the shorter hours, so that their interests and the employees' interests coincided. Nonetheless, the employees demanded the shorter hours of operation in their own self-interest.

The only material distinction from this case is that the food retailers in Chicago formally negotiated the hours reduction with the union whereas the car dealers in Detroit, with the advice of their associations, gave in to the demands of their employees and unions to avoid formal multi-employer bargaining.

Justice White wrote an opinion in *Jewel Tea*, joined by the Chief Justice and Justice Brennan.[14] He addressed the subject

[14]Justice Goldberg, joined by Justice Harlan and Justice Stewart, concurred in the result in an opinion which would provide abroader scope to the exemption. 381 U.S. at 697. Justice Goldberg's view was that "col-

matter of the agreement. Where there is an elected union, the labor laws require bargaining over "wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects." 381 U.S. at 689.

Justice White then considered whether the restriction on hours of operation was sufficiently related to a mandatory subject of bargaining that an agreement on hours would be exempt. This was the crucial issue. 381 U.S. at 689-90:

> Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.

The court of appeals had ruled that the hours of operation of business involved a "proprietary" management decision, at the grocer's discretion, which was not exempt. The Supreme Court, however, ruled that the agreement on which hours were worked was exempt. 381 U.S. at 690-91, 697. Justice White noted that it was "impractical" for stores, even self-service markets, to remain open at night without there being some effect on the butchers' legitimate interests. 381 U.S. at 694.

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lective bargaining *activity* concerning mandatory subjects of bargaining" is exempt, reardless of the nature of the activity, the intent of the participants, the effect of the activity, or any other factor. 381 U.S. at 709-10 (Emphasis added.)

For over forty years the butchers had opposed night work and had consistently sought not just to shorten the work week but to shorten the hours of operation of the markets. Both employers and employees recognized a relationship between the butchers' work week and the markets' hours of operation. 381 U.S. at 695- 97.

The Court ruled that "the union's unilateral demand for the same contract of other employers in the industry" was also exempt. 381 U.S. at 691.[15] The fact that uniformity also served the employers' interests, and that the contract required uniformity, did not detract from the protected nature of the union's demand for uniform hours.

The Court concluded that the agreement setting uniform hours of operation was exempt pursuant to the nonstatutory exemption. Although the Court did not explicitly address whether the exemption protects employers as well as employees, such a conclusion is inherent in the decision. The employer association and its representative were defendants. The dismissal of the case was equally applicable to them.[16]

C. *The Applicability of the Labor Exemption*

The history of the development of the labor exemption to the antitrust laws shows that, where joint employer action is aimed at restraining trade, claims that the action is designed to benefit employees will not immunize that action; but where

[15]Unions have a legitimate interest in eliminating competition based on differences in wages,hours and working conditions. *Duplex*, 254 U.S. at 480-81; *Apex Hosiery*, 310 U.S. at 503.

[16]Subsequent cases have held that the nonstatutory exemption protects employers as well as employees. *Mid-America Regional Bargaining Association v. Will County Carpenters District Council*, 675 F.2d 881, 890 n. 22 (7th Cir. 1982); *cert. denied, 459 U.S. 860 (1982); Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 847 n. 14 (3d Cir. 1974).

the collaboration is directed toward resisting labor demands on issues within the purview of the labor laws, the exemption applies. *Jewel Tea*, for example, shows that concerted employer activity is exempt from the antitrust laws if it was motivated by labor concerns rather than business concerns and its effect on labor concerns is more direct than its effect on business concerns. Thus, the central issue of whose interests are being served can be determined by looking at the evidence of whether there was a labor dispute leading to concerted activity, as well as the motivation for that activity and its effect on the dispute and on competition.

1. Labor Dispute

Complaint counsel argue that the closings here resulted from a conspiracy among the dealers and other respondents and did not grow out of a labor dispute, relying on the fact that the closings resulted primarily without formal collective bargaining agreements. (Complaint counsel's brief at pp. 157-60.) Since many of the dealers were attempting to avoid unions among their employees (F. 285), most of the concessions on closings were not part of such formal, written agreements.[17]

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[17]Complaint counsel argue that respondents may have committed an unfair labor practice by giving workers a benefit with intent to defeat unionization. (Brief at p. 162.) This argument could have merit. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). However, ". . . it cannot be that every time it can be shown that an employer was seeking to stay one step ahead of unionization he was guilty of an unfair labor practice." *NLRB v. Gotham Industries, Inc.* 406 F.2d 1306, 1310 (1st Cir. 1969). This issue, moreover, was not pled or tried in this case. (Complaint counsel's brief at 113, n. 1.) But even if such a case could be made, the exemption may not be denied even if the party is seeking it for acts which violate the labor laws.*Zimmerman v. National Football League*, 632 F. Supp. 398, 404-05 (D.D.C. 1986). Complaint counsels' argument to the contrary is based on an exemption involving "hot cargo" cases, not the nonstatutory exemption. *Ibid.*

The issue is, however, whether the closings grew out of a labor dispute, not whether they resulted from collective bargaining agreements. Concerted employer activity responding to union-led action, even in the absence of a collective bargaining agreement, may still be exempt if it grows out of a labor dispute. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir.1987); *Amalgamated Meat Cutters v. Wetterau Foods, Inc.*, 597 F.2d 133, 136 (8th Cir.1979); *Zimmerman v. National Football League*, 632 F.Supp. 398, 404 (D.D.C.1986). It is the collective bargaining process that deserves protection, not just collective bargaining agreements.[18] The labor laws protect not just the negotiation of collective bargaining agreements between the employer and the union, but the full relationship among employees and employers. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Vic Tanny International v. NLRB*, 622 F.2d 237 (6th Cir.1980).[19] In the absence of a collective bargaining agreement, where the "employer-employee relationship" is the "matrix of the controversy" the labor exemption will apply. *Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702, 713 n. 12 (1982) (dictum).

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[18]The exemption was denied in *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), even though there was a written collective bargaining contract between the union and other employers, because the agreement at issue was not in the context of collective bargaining and was a direct restraint on the business market that did not flow naturally from elimination of competition over wages and working conditions. The union disclaimed interest in unionizing the general contractors' employees but entered into an agreement preventing the contractor from dealing with subcontractors, regardless of how efficient they were, unless they had a contract with the union.

[19]The Norris-LaGuardia Act defines a labor dispute to extend beyond the formal union/employer bargaining situation. 28 U.S.C. 102. The exemption therefore "applies throughout the bargaining process, and not simply to the finished agreement." Areeda and Turner, Antitrust Law at 199 (1978).

The record shows that the closings by dealers were the result of a labor dispute between labor and management. Some closings were in fact collectively bargained.[20] (F. 288-89; Tennyson Tr. 1793-95.) Sales employees and their unions attempted to negotiate a uniform closing as part of the formal collective bargaining negotiations. (F. 167-69, 174-75, 179; Demmer Tr. 2578-79; Thompson Tr. 3241-42.) Sales employees negotiated a prohibition on reopening. (Burwell Tr. 2114, 2126.) Dealers attempted to resolve the sales employee's demand to close on Saturday by closing on other days. The sales employees refused. (F. 235.) Dealers attempted to resolve the demands for closing by splitting shifts. (F. 172, 236-37.) The sales employees got into fist fights over lost sales and demanded uniform shorter hours. (F. 99-104, 120-23.) Unions demanded uniform shorter hours and the sales employees went out on strike when dealers refused. (F. 108, 131, 135, 148,

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[20]Several respondents did negotiate collective bargaining agreements with an hours restraint. (F. 288-99.) A collective bargaining agreement includes unwritten agreements and custom. *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-80 (1960). Even though a written collective bargaining agreement does not require a dealer to shorten its showroom hours, reductions undoubtedly became part of the custom of employer-employee relationships in dealerships in the Detroit area. The record shows that the parties to bargaining agreements treated the shorter hours as a contractual requirement. (RX 506B-C; Sullivan Tr. 505; Burwell Tr. 2129-30; Genthe Tr. 3318-19.) The parties to Teamsters' labor contracts, for example, interpreted the "maintenance of standards" provisions in the written collective bargaining agreements to preclude dealers from opening on Saturday. (F. 229-31, 243.) And when a dealership has been closed on Saturdays and weekday evenings, other than Mondays and Thursdays, this conduct becomes part of the collective bargaining agreement as a result of the dealerships' past practices. (F. 244.)

189-92, 200-28.)[21] The sales employees and their unions reinforced their demands for uniform shorter hours by intimidation and violence on many occasions and over many years. (F. 84-85, 68 (1947); F. 164, 191-92 (1966); F. 210-21 (1971); F. 245-76 (1973-1984).) Gradually, over the years, dealers gave in and agreed to the sales employee's demands for uniform shorter hours. (F. 240-42, 285-87, 136-41, 193.)

Some dealers agreed orally and informally with sales employees and their unions to meet the demands for uniform shorter hours.[22] (F. 239.) This was part of the collective bargaining process. ". . . [T]o qualify for the exemption, the understanding between the parties need not be contained in a formal collective bargaining agreement." *Zimmerman v. National Football League*, 632 F.Supp. 398, 404 (D.D.C.1986). The National Labor Relations Act does not require that a labor contract be in writing. *Labbe' v. W.M. Heroman & Co.*, 521 F.Supp. 1017, 1021 (M.D.La.1981).

Complaint counsel argue that the closings were the result of a conspiracy among respondents, with little or no employee involvement in the agreement.[23] The weight of the evidence, however, shows substantial employee involvement in the closings, and that the concerted activity by respondents was impelled by that involvement. Just as in *Jewel Tea*, the employers

[21]The filing and prosecution of employee grievances is a fundamental, day-to-day part of collective bargaining and is protected by the labor laws. *United States Postal Service v. NLRB*, 652 F.2d 409, 411 (5th Cir. 1981). The record in this case shows vigorous and long standing employee grievances by sales employees and their unions. (F.108, 129-30, 147-48, 153-54, 206, 241, 282.) The settlement of these grievances by uniform closings was therefore part of the collective bargaining process even without any eventual written collective bargaining agreement.

[22]One dealer testified that after strikes and threats the union representative for his sales employees said: "we're not going to work the long hours." The dealer replied: "Hey, fellows, if that's what it takes, that's what I'll do." (F. 189).

[23]Brief at p. 162; reply brief on conclusions of law at p. 26.

ing with the demands of labor. That concerted activity must be exempt even if no collective bargaining agreement results, or indeed even if the parties never actually conduct negotiations. Otherwise, the employers would have to come to the negotiating table with no prior agreement on their common position. To be workable, the exemption must cover the full collective bargaining process.[24]

2. Concerted Activity

Paragraph 4 of the Complaint alleges that respondents engaged in "agreement, contract, combination or conspiracy with each other and with other persons," in adopting a schedule limiting hours of operation for the sale of cars in the Detroit area and attempting to persuade dealers to limit hours of operation. The record in this case shows that respondents engaged in concerted activity.[25] (F. 11-50.) This concerted activity grew out of a labor dispute and was in response to the demands of the sales employees and their unions. (F. 76-299.) The "other persons" involved in this concerted activity therefore included those employees and their union representatives. (*See also*, F. 189, 173, 238.)

3. Intent

The attempt to achieve uniform shorter hours of operation in this case was motivated by labor concerns. For decades the sales employees and their unions demanded uniform shorter hours of operation. (F. 101, 104, 107-08.) The dealers,

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[24] *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 287 n. 5 (1968) (Harlan, J., concurring: "It seems equally obvious that the employers are not violating the antitrust laws either when they confer about wage policy preparatory to bargaining or when they sign an agreement").

[25] I do not, however, find a "conspiracy." That pejorative label connotes an element of intent missing from this record. Oppenheim, Federal Antitrust Laws, p. 178 n. 1 (3rd ed. 1968).

usually coordinated by their associations (F. 11-13), closed in response to these demands. (F. 14-16.) The discussions among the dealers concerning uniformity primarily focused on the labor repercussions (F. 144, 158-59, 162) of closing rather than on the competitive repercussions. This evidence extends from the 1950s (F. 107) through the present. (F. 282-86.) A few dealers may have found that they profited from the shorter hours. (F. 57- 62.) But the weight of the evidence shows that the dealers would not have shortened their hours but for the demands of their employees. (F. 135, 140-41, 144, 162, 198, 236-37, 241, 285-87.)[26]

In *Jewel Tea*, grocery stores lowered their costs by closing during the evening, and negotiated a contractual provision requiring uniformity of hours. 274 F.2d at 222. But this fact was outweighed by the butchers' motivation for demanding the uniform shorter hours and the stores' motivation for acceding to the demands. The fact that some employers might have found that they benefit from the closings (F. 61) does not prove that the conduct was motivated solely by that benefit. *Lewis v. Pennington*, 400 F.2d 806, 814-15 (6th Cir.), cert. denied, 393 U.S. 983 (1968).

4. Absence of a Multi-Employer Bargaining Unit

Respondents have, for many years, cooperated to cope with the demands of car sales employees. (F. 11-50.) Yet, they have never applied for certification by the National Labor Rela-

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[26]Complaint counsel imply that respondents' actions were actually motivated by "anti-union animus." In the absence of a long history of substantial labor law violations, general hostility to the union does not constitute anti-union animus. *P.J. Stevens & Co. v. NLRB*, 638 F.2d 676, 680-81 (4th Cir. 1980); *Florida Steel Co. v. NLRB*, 587 F.2d 735, 744 (5th Cir. 1979); *Plumbers and Steamfitters v. Morris*, 511 F. Supp. 1298, 1310 (E.D. Wash. 1981).

tions Board of a multi-employer bargaining unit.[27] They were advised by counsel that such certification would make it easier for a union to gain a foothold.[28] (F. 89, 91, 157.)

Complaint counsel contend that the labor exemption to the antitrust laws does not apply to concerted activity of employers acting outside of a collective bargaining context, and that the absence of certification as a multi-employer bargaining unit indicates a lack of intent to bargain. (Complaint counsel's brief pp. 160-62.)[29]

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[27]One function of the National Labor Relations Board is to delineate collective bargaining units. *Multi-Employer Bargaining and the National Labor Relations Board*, 66 Harv. L.R. 886, 888 (1953). The power to order multi-employer bargaining does not derive from statutory enactment but is an instrument of the National Labor Board's policy and duty—the promotion of industrial peace through effective bargaining. Tennessee Products & Chemical Corporation v. NLRB, 423 F.2d 169, 177 (6th Cir.), *cert. denied*, 400 U.S. 822 (1970).

[28]Union leaders prefer dealing with multi-employer bargaining units because they enhance union security, since a rival union must win a majority of a larger number of workers before it can replace a recumbent union, and such bargaining furthers standardization of wages and working conditions. 66 Harv. L. Rev. at 887.

[29]The strongest case cited for this argument is *Cordova v. Bache & Co.*, 321 F. Supp. 600 (S.D.N.Y. 1970). There, brokerage firms jointly agreed to reduce the commissions paid to their sales representatives, in the absence of any anticipated multi-employer agreement, or, indeed, of any labor organization representing the employees. The court held that, 321 F. Supp. at 607:

> Because of the evils which such economic power may entail . . . .multi-employer bargaining has been circumscribed by the proviso that it may not be unilaterally invoked by employers; the affected employees, through their collective bargaining representatives, must unequivocally consent to bargain with the multi-employer unit, *NLRB v. Great Atlantic & Pacific Tea Co.*, 340 F.2d 690, 692-93 (2d Cir. 1965). Although the point at which employers may act jointly has not been fixed with certainty, such action is permissible only in connection with, or at most in preparation for, collective bargaining negotiations or

To understand whether the failure to have a certified multi-employer bargaining unit is a fatal lapse, resulting in a conspiracy, the policy reasons for multi-employer bargaining should be understood.

The background of multi-employer bargaining was explained in *NLRB v. Truck Drivers Union*, 353 U.S. 87 (1957). There, a group of employers had formed a multi-employer bargaining unit. After the union struck and picketed the plant of one of those employers, other members of the employers' association closed their plants and locked out their employees until the strike was terminated. The Court affirmed the finding of the Board that this did not constitute an unfair labor practice, and traced the history and usefulness of multi-employer bargaining. 353 U.S. at 94-96:

> . . . Multi-employer bargaining long antedated the Wagner Act, both in industries like the garment industry, characterized by numerous employers of small work forces, and in industries like longshoring and building construction, where workers change employers from day to day or week to week. This basis of bargaining has had its greatest expansion since enactment of the Wagner Act because employers have sought through group bargaining to match increased union strength. Approximately four

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agreements with employees or unions exempt from the prohibitions of the antitrust laws.

That case erroneously assumes, however, that the labor exemption does not protect any concerted action by employers. 321 F. Supp. at 607. Furthermore, it did not arise from a labor dispute and the concerted activity was intended to achieve solely business objectives. See the connected case, *Jacobi v. Bache & Co.*, 377 F. Supp. 86, 89 (S.D.N.Y. 1974), *aff'd*, *520 F.2d 1231 (2d Cir. 1975)*, *cert. denied*, 4243 U.S. 1053 (1976). The case was therefore ruled by *United States v. Women's Sportwear Manufacturers Association*, 336 U.S. 460 (1949), in that the employers were hiding behind indirect labor effects to pull their "chestnuts out of the antitrust fires."

million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations. At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.

The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining. The inaction of Congress with respect to multi-employer bargaining cannot be said to indicate an intention to leave the resolution of this problem to future legislation. Rather, the compelling conclusion is that Congress intended "that the Board should continue its established administrative practice of certifying multi-employer units, and intended to leave to the Board's specialized judgment the inevitable questions concerning multi-employer bargaining bound to arise in the future. . . ."

Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining

> as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from nonuniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.[30]

By their concerted activity, the respondents have attempted to achieve several policies for which multi-employer bargaining has been recognized. Respondents acted in the interest of small employers in dealing "on equal basis with a large union and avoiding competitive disadvantages resulting from nonuniform contractual terms." (F. 91.) They have sought "to match increased union strength." (F. 204-05.) And their concerted activity has effectuated "the national policy of promoting labor peace." (F. 242.) They have, nevertheless, attempted to obtain the benefits of a multi-employer bargaining unit while avoiding the unpleasant consequence (for them) of promoting unionization. If respondents' concerted activity "assumed the character of an offensive weapon which would unfairly advantage the employers"[31] in their dealings with the car salesmen and their unions, they should not be rewarded for their failure to obtain certification as a multi-employer bargaining unit.[32]

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[30](Citations and footnotes omitted.)

[31]*NLRB v. Great Atlantic & Pacific Tea Co.*, 340 F.2d 690, 693 (2d Cir. 1965).

[32]Respondents raise, in effect, a question of primary jurisdiction, suggesting that the Commission should defer questions of labor law to the National Labor Relations Board. (Reply brief at p. 170.) However, "the outer limits of the labor sphere ought not to be defined solely by a labor agency; the Board, charged with implementing one of a number of competing policies, is ill-suited to determine where it breaks off and others take over." Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, Boston U.L.Rev. 317, 328 (1966).

Respondents' concerted action was, however, of a defensive nature, comparable to that of the employers in *NLRB v. Truck Drivers Union, supra*. Their concerted action which resulted in the closings was in response to and in preparation for dealing with the demands of the sales employees.[33] Such cooperation by employers, prior to being certified by the National Labor Relations Board as a multi-employer bargaining unit, appears to be a requisite for such certification. There must be proof of a history of group bargaining by the employers to obtain such certification. *Rainbo Bread Co.*, 92 N.L.R.B. 181, 182 (1950). Therefore, it has long been the practice that, prior to applying for certification as a multi-employer bargaining unit, employers have conferred concerning uniform counterproposals to union demands. *Jacob Schmidt Brewing Co.*, 93 N.L.R.B. 738 (1951); *L.C. Beauchamp*, 87 N.L.R.B. 23 (1949).[34]

This cooperation among employers to meet workers' demands occurs as part of the bargaining process. The absence of eventual certification by the National Labor Relations Board as a multiemployer bargaining unit, or of a final written collective bargaining agreement, fails to change the nature and intent of this activity. The respondents' concerted action and uniform closings also were in response to the demands of sales employees and their unions in a labor dispute, in the context of informal collective bargaining. The concessions made by the dealers inure to the benefit of the employees (F. 119, 197, 241, 286-87) no less than if the parties had reached that provision in a formal written agreement following bona fide arm's-length bargaining. *Mackey v. National Football League*, 543 F.2d 606, 616 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801

[34]In *L.C. Beauchamp*, prior to applying for certification as a multi-employer bargaining unit, car dealers and their association in Chino, California cooperated in facing employees' demands. They agreed to bargain as a unit. The association made a survey of wages being paid by its several members and recommended a uniform wage scale be adopted by all of the members. 87 N.L.R.B. at 25. Certification was denied for failure to show that they had actually bargained with the employees.

(1977). Therefore, the absence of certification of the concerted activity of respondents as a multi-employer bargaining unit should not prevent the application of the labor exemption.

5. Effect

The evidence is clear that the impact of the combination here is greater on labor concerns than on competitive concerns. The uniform shortening of hours of operation directly responded to the concerns of the sales employees (F. 242), exactly as the restriction on store hours in *Jewel Tea* responded to the concerns of the butchers.

The effect on competition here is remote. The shorter hours of operation did not increase retail prices of cars sold in the Detroit area. (F. 300.) The only competitive effect is that consumers have been denied a convenience that they otherwise might have had, just as in *Jewel Tea* where consumers were denied the opportunity to shop for meat in the evenings. This competitive effect is too indirect to outweigh the labor effects of uniform shorter hours of operation.

Any successful labor demand for uniformity will affect competition. So long as the competitive effects flow naturally from the elimination of competition over wages, hours and working conditions, the goals of the antitrust laws must be subordinated to the goals of the labor laws. Here, the competitive effects flow directly from the elimination of competition over hours to meet the employees' demands.

Complaint counsel make an appealing argument that the demand for shorter work weeks could have been resolved through split shifts or on a dealer by dealer basis. But it is contrary to the clear weight of the evidence. (F. 99-102, 120-21, 172, 236-37.) The sales employees had a bona fide belief that shorter work weeks were not possible without uniform shorter hours of operation (F. 103-04, 122, 173), and

based their demands on that belief.[35] The competitive effects flowed directly from the dealers' concessions to it.

This case is therefore governed by the holding in *Jewel Tea* and the nonstatutory labor exemption applies.[36]

IV. CONCLUSIONS OF LAW

1. Many of the respondents have engaged in agreement, contract or combination, with each other and in concert with sales employees and their union representatives, adopting or adhering to a schedule limiting hours of operation for the sale or lease of motor vehicles, and attempting to persuade and taking action to persuade dealers to adhere to such a schedule.

2. This matter involves or grows out of a labor dispute.

3. The uniform shortening of hours of operation did not cause substantial prejudice or injury to competition or consumers.

4. The respondents did not violate the Federal Trade Commission Act because any injury to competition or consumers caused by their actions was outweighed by the benefits of labor peace resulting from such actions.

5. The actions of the respondents in uniformly shortening the hours of operation of new car dealerships were motivated primarily by labor concerns and had a more direct impact on competition over hours and working conditions than on business competition.

---

[35]"It ought to be enough to give immunity if the [sales employees] reasonably and sincerely believed that the restriction on store hours yielded direct benefits to the [themselves]." Cox, *Labor and the Antitrust Laws: Pennington and Jewel Tea*, 46 Boston U.L. Rev. 317, 326 (1966).

[36]Since the nonstatutory labor exemption applies here, there is no need to consider the statutory labor exemption. *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 904 (9th Cir. 1987).

6. The nonstatutory labor exemption to the antitrust laws applies to the concerted activity of respondents setting uniform operating hours for the sale of cars in the Detroit area.[37]

The Complaint, therefore, must be dismissed.

---

[37]Other issues are raised in the briefs of the parties. The Administrative Procedure Act provides that initial decisions shall include a statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record. 5 U.S.C. 557(c)(3). The agency, however is only required to make findings of fact on those points relevant to settling the controversy before it. *Deep South Broadcasting Co. v. FCC, 278 F.2d 264, 266 (D.C. Cir. 1960); Community & Johnson Corp. v. United States,* 156 F. Supp. 440, 443 (D.N.J. 1957.

APPENDIX 4

FILED
MAY 22 1992
LEONARD GREEN,
Clerk

No. 89-3388/89/90/91/92

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

IN RE: DETROIT AUTO DEALERS ASSOCIATION, INC. *ET AL.*

BARNETT PONTIAC-DATSUN, INC., *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ORDER

BEFORE: RYAN, Circuit Judge; LIVELY and WELLFORD, Senior Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and conclude that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are denied. Judge Ryan

would grant the petition for rehearing filed by respondent FTC only for the reasons stated in his separate opinion.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,

Leonard Green, Clerk

APPENDIX 5

FILED
MAR 4 1992
LEONARD GREEN,
Clerk

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOS. 89-3388/3389/3390/3391/3392

IN RE: DETROIT AUTO DEALERS ASSOCIATION, INC. *ET AL.*

Petitioners,

BARNETT PONTIAC-DATSUN, INC., *ET AL.*,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Petition For Review Of An Order Of The Federal Trade Commission

---

BEFORE: Ryan, Circuit Judge; Lively and Wellford, Senior Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by the court, that the petition for review is granted in part and the case is remanded,

in accordance with the Opinion of the Court filed herein on January 31, 1992, and the Order of the Federal Trade Commission is affirmed and enforced in all other respects.

FOR THE COURT:

/s/ Leonard Green,

Leonard Green, Clerk

Dated:
Opinion for the Court filed by Senior Circuit Judge Wellford; concurring and dissenting opinion filed by Circuit Judge Ryan.

Supreme Court, U.S.
FILED
SEP 21 1992
OFFICE OF THE CLERK

No. 92-333

In the Supreme Court of the United States

OCTOBER TERM, 1992

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the nonstatutory labor exemption to the antitrust laws protects an anticompetitive agreement entered into by horizontal competitors outside of the context of collective bargaining or negotiations with employees.

2. Whether petitioners' agreement to limit and standardize retail hours at their automobile dealerships constitutes an unfair method of competition prohibited by Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

3. Whether the Federal Trade Commission's remedial order bears a reasonable relationship to petitioners' violation of Section 5 and constitutes a permissible exercise of the Commission's discretion.

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In the Supreme Court of the United States

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FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-49a, is reported at 955 F.2d 457. The opinion and order of the Federal Trade Commission (Commission), Pet. App. 50a-117a, and the initial decision of the administrative law judge, Pet. App. 118a-201a, are reported at 111 F.T.C. 417.

JURISDICTION

The judgment of the court of appeals, Pet. App. 204a-205a, was entered on March 4, 1992. The petitions for rehearing were denied on May 22, 1992. Pet. App. 202a-203a. The petition for a writ of certiorari

was filed on August 20, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are more than ninety automobile dealerships engaged in the retail sale of automobiles in the Detroit, Michigan, metropolitan area; eighteen trade associations; more than seventy individual principal owners or operators of the dealerships; and one trade association executive (collectively, the dealers). Pet. App. 2a-3a. In 1959, most Detroit automobile dealerships were open weekday nights as well as Saturdays.[1] Pet. App. 3a-4a. In that year, the Teamsters Union began an organizational campaign and, by 1960, two rival unions were seeking to organize employees of the dealerships. Among other things, the unions demanded multiemployer bargaining and uniform and shorter hours for salespersons. Petitioners did not engage in bargaining. Instead, petitioners agreed among themselves to reduce their dealerships' showroom hours by closing at 6:00 p.m. on Wednesday, Friday, and Saturday evenings.[2] *Id.* at 59a, 122a-123a. After the night closings were implemented, the unions lost their organizational efforts. *Id.* at 4a, 59a. By 1966, the dealers had further agreed

[1] A Michigan "blue law" enacted in 1953 prohibits dealerships from selling cars on Sundays. Pet. App. 122a.

[2] The dealers arrived at the agreement to implement night closings and to resist unionization at meetings of petitioner Detroit Automobile Dealers Association (DADA) and at meetings of dealer line group associations. Pet. App. 4a & n.2. DADA widely publicized and advertised the showroom closing hours, and lobbied dealers to comply with them. *Id.* at 122a-124a.

among themselves to close on Tuesday evenings. *Id.* at 54a-55a, 59a.[3]

In the late 1960s, another union mounted a drive to organize the dealers' employees. A number of strikes were called, and many involved violence, threats, and vandalism. The organizing effort failed to obtain multiemployer bargaining, but did result in the negotiation and ratification of a few individual collective bargaining agreements with particular dealers. Although union negotiators had sought Saturday closings, the agreements did not provide for such closings. Instead, the agreements generally gave management the right to determine business hours. Pet. App. 59a-60a.

During the 1970s, the Teamsters made a renewed effort to organize some of the dealers' employees. One issue used to recruit employees was a demand for Saturday closings. The Teamsters failed to obtain multiemployer bargaining or collectively bargained Saturday closings. Pet. App. 5a, 60a-61a. By 1973, however, petitioners had agreed among themselves to implement Saturday closings as a way to achieve labor stability and to thwart unionization. *Id.* at 4a, 61a. As a result, since 1973 almost all of the new-car dealerships in Detroit remain open only two evenings each week. Detroit is the only metropolitan area in the United States in which dealerships are closed on Saturdays. *Id.* at 5a, 56a, 130a.

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[3] DADA explained to one dealer that the practice of closing three evenings each week had not only pleased employees, but had also "proven popular * * * with the dealers" because it "improved their grosses" by virtue of "the fact that with fewer shopping hours, the public can devote less time to shopping, and consequently forcing down prices." Pet. App. 80a, 131a-132a.

2. In 1984, the Commission issued an administrative complaint charging that the dealers' agreement to close showrooms on Tuesday, Wednesday, and Friday evenings and all day on Saturday constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Pet. App. 50a. After a lengthy hearing, the administrative law judge (ALJ) dismissed the complaint. The ALJ concluded that the dealers' agreements had been reached as a result of a labor dispute growing out of demands by employees and unions for a shorter, uniform work week. The ALJ further concluded that any injury to competition resulting from the dealers' agreement was not only remote and indirect, but was justified by the labor peace the agreement produced. Relying on *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965), the ALJ concluded that the agreement was immunized under the nonstatutory labor exemption to the antitrust laws. Pet. App. 51a, 178a-201a.

The Commission reversed. Pet. App. 50a-111a. First, the Commission determined that the nonstatutory labor exemption is not available to petitioners. The Commission explained that the purpose of that exemption is to protect and facilitate the collective bargaining and negotiating process. Here, the Commission found that the dealers' agreement to limit showroom hours was not part of a process of labor negotiations, but was designed to frustrate collective negotiations. The Commission also rejected petitioners' effort to portray their agreement as the result of union pressure that was tantamount to negotiations, stating that there is no evidence that the dealers' agreement emerged from arm's length bargaining. It further concluded that the few individual collective bargaining agreements reached with

particular dealers did not establish shorter working hours, but merely incorporated pre-existing hours established by the dealers' agreement.[4] *Id.* at 61a-74a.

Second, applying the analysis it developed in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549, 604 (1988), the Commission concluded that the dealers' agreement violated Section 5. Pet. App. 74a-87a. It noted that the reduction in hours amounted to a restriction on output, because consumers who are shopping for automobiles will consider not only price, but also "whether the [dealer] provides hours that are convenient to the consumer's schedule." *Id.* at 77a. The Commission also observed that petitioners "expected the hours restriction to benefit them by limiting comparison shopping" and thereby suppressing price competition. *Id.* at 80a. Because the dealers' horizontal agreement tended to restrict competition and was not supported by any plausible justification grounded in efficiency, the Commission found that it violated Section 5.[5] *Id.* at 83a.

[4] The Commission distinguished this Court's decision in *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, *supra*, by noting that in that case, the restriction on marketing hours was contained in a collective bargaining agreement that resulted from "bona fide, arm's-length bargaining." Pet. App. 71a. Here, in contrast, only employers are party to the dealers' agreement and it did not result from labor negotiations. *Ibid.*

[5] The Commission rejected petitioners' claim that no violation of Section 5 could be established absent a showing that car prices in Detroit went up as a consequence of the dealers' agreement. Pet. App. 84a. The Commission explained, *id.* at 85a, that this Court had rejected a similar argument in *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 461-462 (1986). Moreover, the Commission noted that even if prices did not go

To remedy the violation, the Commission ordered, among other things, that dealers open their showrooms a minimum of 64 hours per week for one year; that dealers refrain from discussing showroom hours among themselves, except when necessary to comply with the Commission's order; and that the associations of dealers enforce that prohibition by keeping transcripts of business meetings for five years, and by investigating alleged violations and expelling, within 30 days, any member who violates the ban on discussion of showroom hours. Pet. App. 92a-104a.

3. The court of appeals generally affirmed the Commission's order, but remanded for further consideration of certain issues. Pet. App. 1a-33a. The court agreed with the Commission's conclusion that the nonstatutory labor exemption does not shield the dealers' agreement from antitrust scrutiny. While noting that the dealers reached their agreement partially in response to union pressure (including violence and threats) to shorten working hours, the court concluded that the agreement itself—which was between dealers, not dealers and employees—did not result from collective bargaining or arm's length negotiations with employees, and was therefore not entitled to antitrust immunity.[6] *Id.* at 19a-21a.

The court differed from the Commission, however, as to the potential applicability of the nonstatutory labor exemption to individual dealers who had signed collective bargaining agreements. Pet. App. 21a. As

up, consumers were forced to "pay higher prices as a result of the hours restriction in the form of reduced convenience and service." Pet. App. 85a.

[6] The court of appeals agreed with the Commission that those factors distinguish the agreement in this case from the agreement involved in *Jewel Tea*. Pet. App. 20a.

to those dealers, the court found that the agency's findings were insufficient on the question whether "under these several separate collective bargaining agreements there was *bona fide* negotiation and effectual limitation of showroom hours." *Ibid.* Accordingly, while reiterating that "the dealer's *association*, the collective group of dealers, cannot properly claim the benefit of the nonstatutory exemption," the court remanded for the Commission to determine whether any individual dealers could claim "an exemption under the circumstances of bona fide collective bargaining with a union for shorter showroom hours or as a direct result of *union directed* violence and force for shorter showroom hours."[7] *Id.* at 23a.

Next, the court of appeals upheld the Commission's conclusion that the dealers' limitation of hours

[7] The court appeared to reason that an individual dealer could claim entitlement to the exemption if it could show that "direct negotiations and collective bargaining with salesperson employees or their representatives * * * actually brought about additional or different limits on showroom hours of operation"; therefore, the court found it "material for the FTC to consider whether separate dealer-union agreements existed with unions which 'contained bargained-for hours restrictions,' which were the product of genuine collective bargaining." Pet. App. 22a. Although the Commission found that no such agreements existed here, see *id.* at 60a-61a, 72a-73a, the court stated that the Commission's analysis was inadequate. *Id.* at 23a-24a. Other statements in the court's opinion, however, may suggest that the court believed that a dealer's adoption of shorter hours "under force and threats of vandalism, violence, picketing and property damage," *id.* at 23a, could show that "there was a restraint on hours of showroom operation imposed by a union rather than by the collective agreement with and among the other dealers or the association," and that this would bring the nonstatutory labor exemption into play. *Id.* at 24a.

constituted a violation of Section 5 of the FTC Act. Pet. App. 24a-31a. The court disagreed with the Commission's characterization of the dealers' reduction of hours as a limitation on output, and it stated that a Rule of Reason analysis rather than a per se approach should be employed in this case. Nevertheless, the court concurred with the Commission's view that "showroom hours may be an area of competition among the dealers," *id.* at 26a, and found that no efficiency justification existed to support the dealers' agreement. *Id.* at 29a-30a. The court further found that the Commission did not err in drawing an analogy to *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), to support the conclusion that, even absent a showing of actual price increase, the limitation on competition in showroom hours was an unreasonable restraint of trade. Pet. App. 26a-27a.

Finally, while the court affirmed the Commission's remedial order in most respects, it remanded in part. Expressing concern that the requirement that dealerships stay open for 64 hours per week for one year is "overly broad and intrusive on the manner of operation, and without a reasonable relation to the practices condemned," the court "suggest[ed]" that the Commission consider allowing dealers the option of opening for an average of ten-and-one-half hours each weekday, plus some minimum time on Saturdays, for the one year period. Pet. App. 32a. The court also suggested that the Commission reconsider whether 30 days would be sufficient for the dealers' trade associations to investigate and expel a member who violated the order by discussing showroom hours (even though petitioners had not challenged that provision). *Ibid.*

Judge Ryan concurred in part and dissented in part, stating that the Commission's "decision should be

affirmed in its entirety." Pet. App. 34a. Judge Ryan faulted the majority for failing to give proper deference to the Commission and for inadequately explaining its reasons for rejecting certain of the FTC's conclusions. *Ibid.* In particular, he objected to the limited remand to determine whether any individual dealers could assert the nonstatutory labor exemption. Judge Ryan noted that the Commission had already "considered, and rejected, the dealers' position on this factual issue." *Id.* at 35a. Because the FTC found that no bona fide, arm's length negotiations over hours had occurred, Judge Ryan concluded that there was no reason to give particular dealers "another chance on remand to litigate an issue already decided by the Commission and supported by evidence in the record." *Id.* at 37a.

Judge Ryan also believed that the FTC had correctly analyzed the antitrust issue. He disagreed with the majority that the Commission had employed the per se approach, and concluded that the Commission's limited consideration of efficiency justifications was more appropriate than the majority's application of a full-blown Rule of Reason inquiry. Judge Ryan further stated that the FTC's conclusion that the hours restriction was a restraint on the product market in the sale of automobiles was supported by common sense, economic theory, and "most importantly, the record." Pet. App. 37a-45a.

Finally, Judge Ryan disagreed with the majority's suggestion that the Commission reconsider certain portions of its order. He noted that the majority did not conclude that the order was legally erroneous, but simply believed that another approach might be preferable. In his view, the requirement that dealers remain open for 64 hours per week is reasonably related to the violation and within the Commission's

discretion, as is the provision that a dealers' association has 30 days in which to investigate a complaint. Accordingly, he would have enforced the Commission's order in full. Pet. App. 46a-49a.

ARGUMENT

1. Petitioners contend (Pet. 8-16) that the court of appeals erred in refusing to hold that the antitrust laws' nonstatutory labor exemption protects the dealers' agreement to reduce and standardize showroom hours. They assert that because the dealers entered into their agreement in response to demands by labor, the agreement is protected against antitrust liability. That contention is incorrect and does not warrant this Court's review.

a. By statute, both the existence of, and certain activities by, unions are exempt from the antitrust laws. See Clayton Act §§ 6, 20, 15 U.S.C. 17, 29 U.S.C. 52; Norris-LaGuardia Act, 29 U.S.C. 104, 105; *United States* v. *Hutcheson*, 312 U.S. 219 (1941). The statutory labor exemption does not extend to agreements between unions and nonlabor parties, however, or to agreements between employers. This Court has nevertheless recognized a nonstatutory labor exemption to the antitrust laws that protects certain limited agreements in which nonlabor parties participate. The exemption responds to the fact that if all agreements between unions and other parties were subject to the antitrust laws, the policy of federal labor law to promote negotiated agreements would be defeated. Accordingly, "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA [National Labor Relations Act] and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited

nonstatutory exemption from antitrust sanctions." *Connell Constr. Co.* v. *Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975); see *United Mine Workers* v. *Pennington*, 381 U.S. 657, 664-665 (1965).

Petitioners seek to stretch the nonstatutory labor exemption to protect their agreement to limit showroom hours—an agreement that was not reached with employees, did not result from collective bargaining or negotiations, and was motivated not to further but to frustrate unionization of the employees. Pet. App. 68a. That contention finds no support in the purpose of the nonstatutory labor exemption or in this Court's cases. "The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell*, 421 U.S. at 622; see *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 (1965) (plurality opinion). That policy is inapplicable here. As the Commission found, petitioners "agreed among themselves, not with their employees" to restrain competition with respect to automobile showroom hours, and they did so "in order to *avoid* arm's-length negotiation." Pet. App. 73a-74a. Plainly, such an agreement among employers, divorced from negotiations with employees, does not further the national policy favoring collective bargaining and negotiated settlements. Nor has any decision of this Court applied the nonstatutory exemption to unilateral action by a group of employers, outside the context of collective bargaining or negotiations.[8]

[8] This case does not raise any issue regarding the applicability of the exemption to agreements among employers in multiemployer bargaining units. Petitioners never formed such a unit. Pet. App. 72a n.12, 193a-194a. Nor does it raise

Petitioners assert (Pet. 11-13) that because the labor laws give employees the right to engage in concerted action other than collective bargaining, the nonstatutory exemption should be extended to cover this case, in which petitioners supposedly "capitulat[ed]" to concerted demands by employees for shorter hours. The nonstatutory labor exemption, however, is not designed to promote employer alliances in labor disputes that are undertaken outside of a negotiating or collective bargaining setting. The exemption was developed to further the labor laws' preference for negotiated resolutions of labor disputes. See *Mackey* v. *National Football League*, 543 F.2d 606, 614 (8th Cir. 1976) (exemption requires, *inter alia*, an agreement that is "the product of bona fide arm's-length bargaining"), cert. dismissed, 434 U.S. 801 (1977). Here, petitioners turned their back on labor negotiations and instead agreed among themselves on a regime for altering showroom hours. Such joint action by employers is a far cry from the negotiated agreements that the labor laws envision as the means of reducing labor unrest and achieving labor stability. See 29 U.S.C. 151; *American Hosp. Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1541-1542 (1991) ("The central purpose of the [National Labor Relations] Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective- bargaining negotiations.").[9]

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any issue regarding the length of time that the exemption remains available to employers who maintain the provisions of a collective bargaining agreement after its expiration. See *Powell* v. *National Football League*, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 111 S. Ct. 711 (1991).

[9] It is not sufficient for petitioners to claim that their agreement originated in a labor dispute and that it has no consequences that do not follow naturally from regulating

b. Contrary to petitioners' contention (Pet. 8), the decision in this case does not conflict with *Local Union No. 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, *supra*. In that case, the Court considered the provision of a collective bargaining agreement between butchers' unions and Chicago retailers of fresh meat that prevented the sale of meat before 9:00 a.m. and after 6:00 p.m. The Court found that the hours restriction was protected against antitrust attack by the nonstatutory labor exemption. The plurality noted that the unions had engaged in "bona fide, arm's-length bargaining in pursuit of their own labor union policies," and concluded that the collectively bargained marketing-hours restriction was exempt in light of the district court's factual finding that the restriction furthered the butchers' interest in easing their workload and protecting their jurisdiction. 381 U.S. at 690, 692-697 (plurality opinion). The concurrence found the agreement valid not only on that basis, but also on the broader view that where mandatory subjects of negotiation are concerned, unions, not courts, are entitled to determine the practices that unions "have a legitimate interest in preserving and thus bargaining about." *Id.* at 726-729

working conditions. Pet. 13. If employers could respond to labor demands by agreeing among themselves on policies that standardize working conditions, it would immunize a wide range of anticompetitive practices from antitrust review without furthering any relevant labor law policy. Cf. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U.S. 797, 810 (1945). Here, for example, the Commission found that the dealers that promoted the agreement "clearly recognized economic advantages in agreeing to reduce hours." Pet. App. 69a. Indeed, the agreement here restricted and standardized showroom hours themselves, rather than setting work requirements to be imposed on individual employees within business hours selected by the individual employers.

(Goldberg, J., concurring and dissenting). Thus, in finding that the agreement was protected by the nonstatutory labor exemption, both opinions in *Jewel Tea* emphasized that the agreement emerged from collective bargaining. In this case, the challenged agreement is one among employers, and was reached without any negotiations or collective bargaining with the employees or their representatives. *Jewel Tea* is therefore of no assistance to petitioners.

c. Petitioners also assert (Pet. 10) that the court's requirement of arm's length negotiations conflicts with the decisions in *Amalgamated Meat Cutters, Local Union No. 576* v. *Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979), and *Newspaper Drivers Local No. 372* v. *NLRB*, 404 F.2d 1159 (6th Cir. 1968), cert. denied, 395 U.S. 923 (1969). That claim lacks merit; as the court of appeals noted, this case presents an issue that "differs materially from the relatively few cases which have analyzed and considered [the nonstatutory labor] exemption in other factual contexts." Pet. App. 18a.

In *Wetterau*, after a retail store reached a bargaining impasse with the union, a wholesaler agreed to provide workers to replace the store's striking employees. The court held that, because federal labor law permits the replacement of striking employees to counteract the strike, the vertical agreement to loan employees had "no anticompetitive effect unrelated to the collective bargaining negotiations" and was protected by the nonstatutory labor exemption. 597 F.2d at 136. That holding does not conflict with the decision in this case, which involves an agreement among competitors that was reached without any negotiations and outside of a bargaining process. Even less relevant is *Newspaper Drivers*,

the holding of which addressed the unfair labor practice issues raised by a lockout by one newspaper after another newspaper was struck by a union that had made uniform demands on both.[10] See Pet. App. 67a n.8.

Petitioners suggest (Pet. 14-15) that, although formal bargaining did not take place, there were negotiations in this case in the sense of "adversarial give-and-take between labor and management." That factbound contention warrants no review here, but, in any event, the dealers' agreement was not a product of negotiations with labor. Rather, the agreement was imposed by petitioners to foil negotiations with the unions (as well as to suppress competition). As the Commission noted, petitioners adduced no evidence "that the agreement among the *dealers* resulted from activity that could fairly be characterized as arm's-length negotiation with their sales employees." Pet. App. 73a. While the court of appeals believed that the agreement was designed to obtain "labor peace," it agreed with the Commission that petitioners' agreement "was not * * * a direct product of employer collective bargaining, nor of arm's length dealing with salespersons." *Id.* at 21a.

Petitioners erroneously assert (Pet. 15-16) that the court of appeals gave undue deference to the FTC's legal analysis in finding the nonstatutory labor exception inapplicable to their agreement. The court

[10] In dictum, the court rejected the union's claim that the employers had conspired to violate the antitrust laws, implying that the newspapers had legitimately collaborated to advance their collective bargaining aims. 404 F.2d at 1163. But there, unlike here, the employers had ongoing bargaining relationships with a union. Moreover, any tension between this case and *Newspaper Drivers* would raise at most an intracircuit matter for the Sixth Circuit to resolve.

of appeals' statement that it would give "some deference," Pet. App. 18a, to the Commission's assessment of anticompetitive agreements accords with this Court's statement in *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986), that courts are to give "some measure of deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair.'" As to the application of the nonstatutory labor exemption on the facts of this case, the court's extensive discussion of the legal issues, its independent analysis of the facts, and its partial disagreement with the Commission's resolution of the case[11] all lend credence to its statement that it was applying "essentially de novo" review. Pet. App. 18a.

2. Petitioners contend (Pet. 17-20) that the court of appeals erred in upholding the FTC's determination that the dealers' agreement unreasonably restrained trade in violation of Section 5. In particular, they argue that the restriction of showroom hours constituted only an inconvenience to customers, not an injury to competition, and that it was justified by efficiencies in the form of reduced overhead.

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[11] The court of appeals remanded for the Commission to give additional consideration to the claim that certain individual dealers may have established their showroom hours, not as a result of the *dealers*' agreement, but as a result of independent collective bargaining agreements or perhaps as a result of union directed violence or threats. See note 7, *supra*, and accompanying text. The court's remand order is unjustified. Although we do not believe that that issue would independently warrant further review, we are filing a conditional cross-petition for a writ of certiorari so that, if the Court grants the petition here, it may consider all of the labor exemption issues in this case, including whether the court of appeals erred in ordering the remand.

The Commission found that the dealers, like other retailers, compete not only in the products they sell, but also in the services they provide, including their business hours. Pet. App. 77a. Relying on "common sense," "economic theory," and "the record," the Commission concluded that an agreement reducing showroom hours "disrupt[s] the market's price-setting mechanism," and, even if it does not raise prices, imposes costs in the form of more burdensome shopping opportunities that "are no less real or harmful to consumers than higher prices for goods and services."[12] *Id.* at 80a, 85a-86a. The court of appeals, albeit applying a somewhat different analysis, upheld the agency's finding that the dealers' agreement unreasonably restrained trade.[13] Pet. App. 24a-31a.

The Commission's finding that the dealers' restriction on hours is anticompetitive is in keeping with this Court's recognition that businesses compete on "all elements of a bargain—quality, service, safety, and durability—and not just immediate cost." *National Society of Professional Engineerss* v. *United*

[12] The Commission quoted at length from R. Bork, *The Antitrust Paradox* (1978), in support of its conclusion that "there is no economic difference between an agreement to limit shopping hours and an agreement to increase price." Pet. App. 78a-79a.

[13] The court of appeals mistakenly believed that the Commission had applied a per se approach to the dealers' agreement, and stated that a full-scale Rule of Reason analysis was warranted. In fact, the Commission's analysis concluded that since the dealers' agreement was inherently suspect, a complete Rule of Reason analysis would be appropriate only if there was a plausible efficiency justification for the agreement, which it did not find. Because the court of appeals upheld the Commission's ultimate determination on the antitrust issue, the disagreement in approach does not merit this Court's review.

States, 435 U.S. 679, 695 (1978). As the Commission found, this case is analogous to *Indiana Fed'n of Dentists*, in which the Court upheld the FTC's determination that a restriction on services unreasonably restrained trade. In that case, a group of dentists agreed not to supply X-rays to insurance companies who sought to use them in determining whether covered dental services were justified. In finding the dentists' agreement to be unreasonable, the Court explained that "[a] refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." 476 U.S. at 459. Here too, the dealers' refusal to compete in showroom hours prevents competition in a service that consumers desire and thereby impairs the functioning of the market. See Pet. App. 87a.[14]

[14] Petitioners suggest (Pet. 19) that the agreement in this case had no "plausible impact on price" and that a showing of concrete competitive injury was therefore required. The Court rejected the same argument in *Indiana Fed'n of Dentists*, 476 U.S. at 461-462 (agreement to restrict information on whether a service is cost-justified "may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services"). Petitioners argue that their restriction, unlike that in *Indiana Fed'n of Dentists*, has no "plausible impact on price," Pet. 19, but that claim is refuted by the dealers' express acknowledgment that the restriction on customers' ability to comparison shop for the best price had "improved * * * grosses." See note 3, *supra*; see also Pet. App. 131a-132a (quoting dealer statements that closing evenings "cuts down on shopping" and that when dealers closed on Saturday "grosses actually went up"). Likewise, the

In passing, petitioners assert (Pet. 19-20) that their agreement was justified by "efficiencies" because the shorter hours decreased the dealers' overhead. Petitioners did not press that claim before the Commission itself, and the efficiency justification that petitioners claim is not the type that this Court has found to justify an otherwise anticompetitive restraint. Cf. *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984); *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1 (1979). Moreover, as the Commission explained, Pet. App. 85a n.24, the decrease in overhead was solely attributable to reducing the service (showroom hours) that consumers desired. Accordingly, consumers would not benefit from that "efficiency" unless the price of cars dropped—a hypothesis that is at odds with petitioners' claim that their agreement had no "impact on prices." Pet. 17.

3. Finally, petitioners challenge (Pet. 20-25) the provisions of the Commission's order requiring that dealers keep showrooms open for a specific number of hours per week for one year; that dealers may not discuss showroom hours; and that the association petitioners must make transcripts of business meetings for five years.

Unless the Commission's remedy "has no reasonable relation to the unlawful practices found to exist" or constitutes an abuse of discretion, the remedy must be upheld. *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). In this case, none of petitioners' objections

suggestion (Pet. 18) that suburban car dealers could check the anticompetitive consequences of petitioners' agreement is no more persuasive than the claim rejected in *Indiana Fed'n of Dentists*, 476 U.S. at 460-461, that consumers could escape from the anticompetitive agreement in that case by commuting to neighboring communities for dental care.

justify denial of enforcement of the Commission's order.[15]

The Commission's order that the dealers maintain additional hours is a reasonable response to the finding that the dealers had unlawfully restricted showroom hours. It is settled that the Commission may compel affirmative conduct to eliminate the cause and consequence of illegal conduct. See, *e.g.*, *Simeon Management Corp.* v. *FTC*, 579 F.2d 1137, 1147 (9th Cir. 1978); *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749, 758-759 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978). The 64 hours-per-week figure falls in the middle of the range of automobile showroom hours maintained in other Midwestern cities. Pet. App. 95a. Likewise, the Commission's prohibition against discussion of hours and its requirement of transcripts of business meetings are reasonably designed to prevent and detect collusive reinstatement of unlawful limitations on showroom hours.

Contrary to petitioners' contention (Pet. 21), the preparation of transcripts is not unduly burdensome, given that such a written record would assist the Commission in detecting collusion in the establishment of hours. Compare *Hospital Corp. of America* v. *FTC*, 807 F.2d 1381, 1393 (7th Cir. 1986), cert. denied, 481 U.S. 1038 (1987). Nor does the restriction on dealer discussion of showroom hours infringe the First Amendment (Pet. 21-22). The dealers' entry in the illegal agreement on hours justifies the future restriction. See *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 697-698

[15] The court of appeals did decline to enforce certain provisions of the order and remanded those issues to the Commission. In our view, that action was not justified, as we explain in our conditional cross-petition.

(1978) (injunction to remedy antitrust violation "may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent [a court] from remedying the antitrust violations"; upholding limitations on speech regarding the ethics of competitive bidding).

Petitioners also argue (Pet. 22) that the requirement of longer showroom hours is an abuse of discretion because in remedying "a minor inconvenience" to consumers, the Commission's order exposes the dealers to an unreasonable risk of harm from violence. The Commission did not "minimize the seriousness of the acts of intimidation appearing in the record," but concluded that its "order will make such coercive activity impractical and give dealers the safety of numbers."[16] Pet. App. 98a. Moreover, the Commission explained that to accept petitioners' rationale "would invite future investigative targets to police anticompetitive restraints with force in hopes that the Commission would shy away from striking down the restraint." *Ibid.* The court of appeals correctly upheld the Commission's judgment, and its holding does not merit further review.[17]

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[16] The Commission noted that its requirement that its order be distributed to employees may head off reprisals against the dealers by informing employees that "their employers are compelled by the Commission to expand hours." Pet. App. 103a.

[17] Nor is review warranted of petitioners' claim (Pet. 24-25) that the order violates the Norris-LaGuardia Act, 29 U.S.C. 104. That Act prohibits certain injunctions in a labor dispute that enjoin persons from refusing to engage in work. As the Commission explained, its requirement of longer hours for dealers is not equivalent to an order enjoining sales employees to cease refusing to work those hours. Pet. App. 98a n.40. The order here is directed to dealers, not their employees.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term 1992

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Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITIONERS' BRIEF IN REPLY TO THE BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The petitioners (''the Dealers'') hereby jointly reply to the Brief for the Federal Trade Commission in Opposition to the Dealers' petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

ARGUMENT

I. The FTC Interpretation of the Non-Statutory Labor Exemption Discriminates Against Non-Union Employees and Their Employers and Precludes Any Resolution of the Labor Dispute

The Federal Trade Commission argues that this Court should deny the petition for writ of certiorari because under existing law a Dealer agreement without collective bargaining to reduce hours uniformly is not exempt from the antitrust laws pursuant to the nonstatutory labor exemption. There are

two flaws in the Federal Trade Commission's analysis of the exemption: (1) the FTC would allow union members to achieve goals that it would prohibit to non-union employees, even though the labor policy of the United States equally protects the rights of both union and non-union employees, and (2) the FTC would deprive the parties to the labor dispute at issue of any lawful means to resolve it.

1. The FTC does not deny that the employees could have achieved uniform hours reductions through collective bargaining with a multi-employer bargaining unit to which all Dealers were parties. That is what happened in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea,* 381 U.S. 676 (1965). The FTC contends that the absence of collective bargaining is a decisive distinction with Jewel Tea. FTC Br. at 11. If so, then non-union employees are denied the same right as union employees to obtain uniform improved wages, hours and working conditions.

This distinction between the wages, hours and working conditions available to union and non-union employees violates the basic policy of the labor laws, which guarantees to all employees the freedom to choose to be unionized or not, as they see fit. *Radio Officers' Union v. NLRB,* 347 U.S. 17, 40 (1954); *NLRB v. Columbia University,* 541 F.2d 922, 931 (2d Cir. 1976).

The FTC argues that collective bargaining is the cornerstone of the labor laws, and concludes that because the labor laws favor unionization only union-related activities should be exempt. But that analysis is 45 years out of date. Ever since the Labor Management Relations Act of 1947, 61 Stat. 136, the law has neither encouraged nor discouraged employees from joining unions, and has assured that the same rights are enjoyed by all employees, whether or not they are unionized. Collective bargaining is now favored only to the extent that

it is a route to labor peace, which is the overriding goal of the labor laws. National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by encouraging the practice ... of collective bargaining and by protecting the exercise by workers of full freedom of association ... for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection"); *Fiberboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 211 (1963) ("One of the primary purposes of the [labor laws] is to promote the peaceful settlement of industrial disputes.")

The FTC implies that non-union employees can obtain hours reductions if there are "negotiations" other than collective bargaining.[1] FTC Br. at 15. But this is directly contradicted by the decision of the Sixth Circuit, which explicitly limited the exemption to unionized employees: Dealers are entitled to the exemption if there is "bona fide collective bargaining with a union for shorter showroom hours or as a direct result of *union directed* violence and force. . . ." 23a. [emphasis in original] The FTC's position is also contrary to its refusal to exempt Tennyson Chevrolet, despite uncontradicted testimony that in 1960 Harry Tennyson negotiated reduced hours with his non-union sales employees. IDF 298-99 at 177a.

2. The FTC would leave only two avenues for resolution of the labor dispute: individual employer reductions in hours or joint reductions in the context of formal collective bargaining as a multi-employer bargaining unit. Both avenues are illusory.

[1]The FTC asserts that the finding that there were no negotiations is "factbound." FTC Br. at 15. On the contrary, the facts are undisputed. The issue is a question of law and policy — was the unchallenged history of employee demands, pressure and intimidation, resulting in employer concessions the functional equivalent of arm's length negotiations? Dealer Br. at 14-15.

The employees' demand was not a bargaining chip or passing whim. It was a long-term, passionately sought goal from at least as early as 1954 until the close of the record in 1987. Dealers Br. at 2-5. The dispute would not, and did not, end until the employees achieved their demand.

The very nature of the demand precluded resolution through concessions by individual Dealers. The employees demanded not just that hours be shortened, but that all Dealers shorten their hours uniformly. Dealers Br. at 2-4. The dual nature of the demand, which was uncontested in the record, is glossed over in the FTC brief, but it is critical. A demand for shorter hours can be met by an individual employer. A demand for uniform hours necessarily requires coordinated employer action.

Since the employers could resolve the dispute only by granting what was demanded, and what was demanded was uniformity, the assertion that the Dealers could have defused the dispute by reducing hours individually is illusory. In fact, the FTC conceded that Dealers tried to resolve the dispute through individual concessions, and failed. 60a.

The necessary coordinated employer action could not be undertaken in the context of formal multi-employer bargaining because the unions failed to organize all of the Dealers. On the whole, the employees chose not to be unionized, as they are entitled to choose (29 U.S.C. § 157); and the employers preferred not to have their employees join a union, which is a position the labor laws entitle them to take. *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). Although the unions never achieved recognition on a city-wide basis, the employees always demanded that all Dealers uniformly reduce hours -- not just the unionized employers.

Since it is unlawful for employers to collectively bargain with a purported representative of employees who choose not to unionize, *International Ladies Garment Workers Union v. NLRB*, 374 F.2d 295 (D.C.Cir. 1967) (employer cannot bargain with a union representative of employees who have not chosen to be unionized even to redress an unfair labor practice), the contention that the labor dispute could have been resolved through multi-employer collective bargaining is contrary to the labor laws.

Thus, if the antitrust laws prohibit uniform hours reductions in the absence of multi-employer collective bargaining, the employees and employers are condemned to perpetual warfare over an unresolvable labor dispute. Alternatively, the employees are forced by the FTC to join a union against their desires in order to preserve uniform shorter hours won through non-union protected concerted activity for their mutual aid and protection.

II. Non-Economic Injury, Consisting of Consumer Inconvenience, Is Not Antitrust Injury.

The FTC asserts that, in the absence of an increase in prices, a practice which makes shopping more burdensome is "no less real or harmful to consumers than higher prices." FTC Br. at 17. On the contrary, it is because inconvenience is less real or less harmful than increased prices that there was no antitrust injury in this case.[2]

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[2]The Federal Trade Commission Act authorizes the FTC to undertake two missions, protecting the market from unfair methods of competition and protecting consumers from unfair or deceptive acts. 15 U.S.C. § 45. The FTC has conceded that its consumer protection mission does not include protecting consumers from subjective injury like inconvenience. Only monetary injury or injury to health and safety is sufficiently harmful to consumers to be contrary to the FTC Act. *In the Matter of International Harvestor Co.*, 104 F.T.C. 949, 1061 (D1984). See also *Statement of Policy*

The antitrust laws are not intended to address all the potential social consequences of joint activity of competitors. They have a specific purpose, that being to prevent certain types of economic injury. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-64 and n.14 (1972). The FTC seeks to prohibit on antitrust grounds activities that at most cause subjective inconvenience to some consumers,[3] a result contrary to the purposes of the antitrust laws. Dealer Br. at 17.

III. The FTC's Defense of the Order Confuses the Victims With the Perpetrators of the Violence

The FTC argues that accepting the Dealers' argument that it is an abuse of discretion to compel them to non-uniformly lengthen their hours in the face of violence and intimidation would "invite investigative targets to police anticompetitive restraints with force in hopes that the Commission would shy away from striking down the restraint." FTC Br. at 21, quoting 98a. This might be an appropriate response *if* the Dealers were the instigators of the violence. But those are not the circumstances of this case.

The FTC's allegation that the Dealers were the perpetrators of the violence was abandoned because there was no evidence linking Dealers with the violence. 50a n.1. The evidence was undisputed that the Dealers were the victims of the violence.

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on the Scope of Consumer Unfairness Jurisdiction, December 17, 1980, reprinted at Trade Reg. Rep. (CCH), Transfer Binder, Current Comment, 1969-83 ¶ 50,421 at 55, 948 ("Emotional impact and other more subjective types of harm . . . will not ordinarily make a practice unfair.") If inconvenience is not sufficient injury to allow FTC action under its consumer protection mission, it is hard to justify FTC antitrust action predicated on such subjective harm.

[3]As previously noted, the inconvenience, if any, was minor. Dealer Br. at 22-23.

The perpetrators of the violence were not the investigative targets of the FTC, they were the employees and their unions.[4]

Under these circumstances, it was an abuse of discretion for the FTC not to give due consideration to the safety of the Dealers' lives and property, and to weigh the credible threat of serious violence against the minimal benefit the order would achieve. Such consideration would not encourage future investigative targets to use force, because a target using force would be a completely different circumstance than a target victimized by force.

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[4]This points out another reason why the FTC's limitation of the scope of the exemption is in error. The perpetrators of the violence were exempt. Only the victims, responding to demands of exempt employees, are subjected by the FTC to the antitrust laws and a remedy that exposes them to renewed violence. The situation in Detroit would be far more appropriately addressed by the labor law or the police. The FTC, which can identify no public injury other than hypothetical inconvenience, should not be permitted to disrupt an accommodation worked out by labor and management over the last thirty-eight years.

CONCLUSION

For the reasons set forth herein and in the Dealers' Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Sixth Circuit.

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